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IN THE

Supreme Court of the United States

AMERICAN NATIONAL INSURANCE COMPANY, MONUMENTAL LIFE INSURANCE COMPANY, AND THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY

Petitioners,

v.

MATTIE BRATCHER, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Federal Rule of Civil Procedure 23(b)(2) – which which provides for the certification of classes seeking injunctive relief – authorizes class certification where all class members seek damages; where at least a million class members can receive only damages; and where massive individual damages inquiries are required?

PARTIES TO THE PROCEEDINGS

In addition to the parties stated in the caption, the following parties are respondents in this proceeding:

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Berniece Scott
Warren Sonnier
Lovenia Sonnier
Mary Sue Truesdale
John Truesdale
Elizabeth Walker
Yvonne Williams
Edna Wyandon

and all similarly situated persons.

American National Insurance Company is a publicly traded company that is not owned by another corporation and does not have a parent. No publicly held corporation owns 10% or more of its stock.

Monumental Life Insurance Company is wholly owned by Capital General Development Corporation and First AUSA Life Insurance Company; the ultimate parent of these companies is AEGON nv, which is the only one of these entities that is publicly traded.

The Western and Southern Life Insurance Company is owned by Western & Southern Financial Group, Inc. which is owned by Western & Southern Mutual Holding Company. No publicly held corporation owns 10% or more of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners American National Insurance Company ("ANICO"), Monumental Life Insurance Company ("Monumental"), and The Western and Southern Life Insurance Company ("Western-Southern") (jointly, "petitioners" or "Insurance Companies") seek a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND JUDGMENTS BELOW

The court of appeals entered an order on April 2, 2004, denying petitioners' petition for rehearing and rehearing *en banc* (App. 1a-3a). The order also withdrew the court's opinion of August 13, 2003, reported at 343 F.3d 331 (5th Cir. 2003) (App. 25a-50a), "for the limited purpose of making minor adjustments in the analyses contained in parts III.A, III.B, and V," (App. 3a), and was accompanied by the revised opinion, which is reported at 365 F.3d 408 (5th Cir. 2004) (App. 3a-24a). The court of appeals' opinions reversed the district court's denial of the motion for class certification. The district court opinion is reported at 208 F.R.D. 571 (E.D. La. 2002) (App. 51a-58a).

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291; it granted review of the district court's order denying class certification under Fed. R. Civ. P. 23(f), and issued its decision on August 13, 2003. Petitioners' timely motions for rehearing and rehearing *en banc* were denied on April 2, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE OR RULE INVOLVED

Federal Rule of Civil Procedure 23 is set forth at App. 59a-65a.

INTRODUCTION

This case presents a mature and repeatedly acknowledged conflict among the courts of appeals concerning the appropriate standard for class certification under Fed. R. Civ. P. 23(b)(2), where, as here, the class seeks injunctive relief and money damages. Rule 23(b)(2) authorizes certification of a mandatory class (*i.e.*, a class from which no member may opt out) seeking injunctive relief where the defendant "has acted or refused to act on grounds generally applicable to the class." In contrast, Rule 23(b)(3) authorizes certification of a non-mandatory class (*i.e.*, a class action in which members receive notice and a right to opt out) seeking money damages where common issues predominate and a class action is superior to other methods of adjudication.

Two circuits, the Second and the Ninth, employ an *ad hoc* balancing test to decide whether Rule 23(b)(2) certification is appropriate when the class seeks injunctive relief and money damages. Expressly rejecting the *ad hoc* test, five other circuits examine whether injunctive relief is the "predominant" relief sought and whether any money damages sought are "incidental." With respect to the latter group, there are substantial disparities in the application of the "incidental damages" inquiry. For example, the court below considered a damages request incidental even though the court acknowledged that the *only* relief available to a substantial portion of the class would be money damages and that class members were *not* entitled "to a one-size-fits-all refund" because "individual damages will depend on the idiosyncrasies of the particular dual rate or dual plan policy" in question. App. 16a.

Critically, moreover, several courts of appeals have noted that this Court's decisions – most particularly *Ticor Title Insurance Co.* v. *Brown*, 511 U.S. 117, 121 (1994) (per curiam) – strongly suggest that certification of a Rule 23(b)(2) mandatory class seeking money damages may violate individual class members' Due Process rights and thus be unconstitutional. These circuits, however, have been unwilling to overrule their respective tests for Rule 23(b)(2) certification without more explicit instructions from this Court.

The decision below vividly illustrates the conflict and confusion in the courts of appeals. The Fifth Circuit panel acknowledged the conflict among the courts of appeals and announced that it would conduct an "incidental damages" inquiry. It then reversed a district court decision denying 23(b)(2) certification to a class of potentially millions of plaintiffs alleging race discrimination involving potentially millions of policies (some expired, some paid-up, some adjusted) under thousands of different plans, issued over many decades by 280 entities, and subject to differing limitations periods based on the actual or constructive knowledge of individual plaintiffs. The court found that injunctive relief could be predominant and damages incidental even though between 20% and 82% of class members seek *only* monetary relief, and even though class members' damages were not a "one-size-fits-all refund" and would have to be individually determined. App. 16a. This decision unlawfully exempts plaintiffs' damages claims from the Rule 23(b)(3) predominance and superiority requirements. Appearing to recognize that the individual damages issues rendered Rule 23(b)(2) certification problematic and potentially unconstitutional, the court of appeals simultaneously ordered the district court to provide notice to class members and to consider granting opt-out rights – rights provided solely under Rule 23(b)(3).

The standard for Rule 23(b)(2) certification when the class seeks money damages presents a recurring and important question. Thousands of class actions are filed each year. Rule 23(b)(2) certification is an increasingly popular option for classes seeking money damages, as it authorizes certification without satisfaction of the rigorous predominance and manageability criteria for Rule 23(b)(3) certification. Yet, the very existence of aggregated claims for millions or perhaps billions of dollars is devastating and exerts coercive pressure on defendants to settle, rather than bet the business on prevailing at trial. To decide the critically important and often dispositive question whether to certify a Rule 23(b)(2) class seeking money damages, a district court must know what standard to apply; yet the federal courts are in conflict on this fundamental question. This results in both forum shopping for the jurisdiction most likely to certify the class, and fundamental unfairness to plaintiffs and defendants as classes are certified in some circuits that would not be certified in others. Substantial variations in what this Court and Congress intended to be a uniform, federal procedural rule create manifest injustice and warrant this Court's attention, especially under a Rule as important and oft-utilized as Rule 23. In addition, current interpretations of Rule 23(b)(2) violate Rule 23, which is structured to create distinctions between classes seeking injunctive relief and those seeking money damages.

In sum, there is a long-standing conflict and substantial confusion about the construction of Rule 23, an important Rule of Federal Procedure that is frequently applied by federal district courts. This issue cries out for this Court's attention and resolution.

STATEMENT OF THE CASE

1. Federal Rule of Civil Procedure 23(b) authorizes three different types of class actions, two of which are implicated in

this case. Relevant here, a class may be certified under Rule 23(b)(2) when

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Alternatively, a class may be certified under Rule 23(b)(3) if "'questions of law or fact . . . predominate over any questions affecting only individual members'" and proceeding by way of a class action is deemed preferable to "'other available methods for the fair and efficient adjudication of the controversy.'" *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 607 nn.10 & 12 (1997). Rule 23(c)(2) expressly provides that individual members of a class certified under Rule 23(b)(3) must be afforded notice and the opportunity to opt out of the class action, but Rule 23 makes no provision for opt-out by members of Rule 23(b)(2) classes.

2. Plaintiffs in three consolidated, multi-district proceedings filed class actions, alleging that the Insurance Companies paid "lower benefits and charg[ed] higher premiums to blacks in the sale of low-value life insurance" in violation of 42 U.S.C. §§ 1981 and 1982. App. 3a. These low-value policies generally fall into a broader category known as "industrial life policies," which have "face amounts of $2000 or less and require small weekly or monthly premiums." *Id.* at 4a. The plaintiffs allege that the Insurance Companies charged African-American policyholders higher premiums for the same benefits ("dual rates") and that the Insurance Companies placed African-American policyholders in substandard plans offering fewer or lower benefits than comparable plans sold to white policyholders ("dual plans"). *Id.* For relief, plaintiffs sought an injunction, prohibiting the collection of any discriminatory rates that remained in force and the reformation of any discriminatory plans that remained in force; plaintiffs also sought millions of dollars in restitution

for past premium overcharges or benefit underpayments. *Id.* at 5a.

Insurance underwriting standards and classifications of risk are guidelines by which insurance companies try to assess whether a particular applicant is a good, bad or questionable risk. Insurance companies have always charged differing rates for different risks. For example, men and smokers pay higher rates for life insurance than women and non-smokers based on their differing life expectancies. Decades ago many insurance companies, using underwriting standards based on government census data reflecting significant differences in African-American and Caucasian life expectancies, charged different rates to African-Americans and Caucasians. App. 4a n.2; Mire Decl. ¶¶ 76-78. Thus, the pricing of industrial life policies was based on underwriting standards, risk classifications, as well as on the plan of insurance, the date of purchase, the age of the insured at the time of purchase, the product's coverage (if any) of built-in benefits such as loss of sight or limb, and the provision (if any) for periodic dividends.

The Insurance Companies actually "comprise over 280 companies," as a result of acquisitions of other companies and blocks of business throughout the 1900s. App. 4a. Commencing in the 1920s and concluding by the 1970s, the Insurance Companies issued thousands of different types of industrial life insurance products – products that varied company by company, time period by time period, and plan by plan. Since then, a substantial percentage of the challenged policies have been either terminated, paid up, or adjusted. *Id.* at 5a. Indeed, it is undisputed that at least one million industrial life policies issued by the Insurance Companies have been terminated (due to lapses, surrenders, maturities, and deaths); the court below recognized that the number might be as high as 4.6 million. *Id.* And, it is further undisputed that with respect to policies reflecting possible race-based underwriting, "as early as 1988, some [of the

Insurance Companies] voluntarily adjusted premiums and/or death benefits to equalize the amount of coverage per premium dollar." *Id.*

In opposing class certification, the Insurance Companies demonstrated that the class could not be certified in light of the substantive issues to be litigated. The Companies' indicated that they intended to argue on the merits, *inter alia*, that (i) the rates and policies were justified by valid insurance underwriting and sound actuarial calculations; (ii) state regulators were aware of the policies and the companies' use of the underlying mortality tables related to race; (iii) the rates and policies offered to African-Americans and Caucasians produced virtually identical profits; (iv) many of the policies had already been adjusted; and (v) many of the allegedly race-based dual rates were the result of a widespread practice of socioeconomic underwriting – *viz.*, underwriting based on the insured's medical condition, income, job classification, job history, and other facts which have an impact on mortality risks and persistency (the likelihood of steady premium payments). App. 6a-8a; Mire Decl. ¶¶ 46-59.

In addition, the Companies asserted an affirmative statute of limitations defense – specifically, that there was no basis for tolling the limitations period because the Companies' pricing practices were known to state regulators and widely publicized. Indeed, since the 1920's, national, local and African-American media outlets have reported that African-Americans paid more than Caucasians for similar coverage. App. 20a-21a.

3. In light of the nature of plaintiffs' claims and the Insurance Companies' responses, the Insurance Companies opposed plaintiffs' request for Rule 23(b)(2) certification of a plaintiff class of "'[a]ll African-Americans who own, or owned at the time of policy termination, an industrial life insurance policy that was issued as a substandard plan or at a substandard rate,'" App 6a.

The district court denied certification under Rule 23(b)(2) for three reasons. First, the court determined that monetary relief would predominate over injunctive relief. The court observed that "many of plaintiffs' proposed class members such as those who have already had their policies adjusted by the defendants, or those whose policies have lapsed, or those on which death benefits have been paid, would not benefit *in any way* from the injunctive relief requested." App. 54a. (emphasis supplied.) The court further explained that "injunctive relief will not benefit anyone seeking to buy Industrial life insurance in the future because the defendants no longer sell so-called industrial life insurance and have not done so since the mid-1980's." *Id.* at 55a. The court also noted the monetary relief sought would not "flow directly" to the class as a whole: "many and a variety of hearings would be required to determine personalized harm to each individual plaintiff because of the mass of policies involved, differing underwriting practices among some 280 companies, differing built in benefits, account dividends, and age at policy issuance." *Id.*

Second, the district court held that the class proposed would not be cohesive because of "the number of different insurance companies that issued the policies in question" with "different underwriting and pricing procedures, involving perhaps a million policyholders." App. 56a. The court would have to "consider: 1) the plaintiff's age at the time the policy was issued; 2) whether the policy had built in benefits, such as a loss of limb benefit; 3) whether the premium as calculated was race-neutral; and 4) whether any dividends were paid on any policies." *Id.* In addition, the court would have to "consider the policies that had lapsed or that had been adjusted by defendants," because "[t]here would need to be a determination of which policies had been adjusted, the amount of the adjustment and whether the adjustment was sufficient." *Id.* at 56a-57a. Indeed, the court characterized

plaintiffs' claim that damages could easily be determined classwide as "unrealistic at best." *Id.* at 57a.

Finally, the court held that it would have to hold individual hearings for class members on "a seriously asserted statute of limitations issue," because all of plaintiffs' claims are time barred on their face. App. 57a. The court pointed out that the Insurance Companies "have introduced evidence that information concerning the insurance practices at issue has been readily available in the national and local media for many years," citing "newspaper and magazine articles and television reports from different areas of the country." *Id.* Moreover, the court explained "different state laws have different time-barring periods" and different laws concerning "fraudulent concealment and overt misrepresentations." *Id.* at 58a.

4. A divided panel of the Fifth Circuit reversed. First, the court of appeals rejected the Insurance Companies' argument that the proposed class definition included not only African-Americans who had purchased dual rate policies or dual plan policies, but also those "who were forced into substandard plans, or forced to pay substandard rates, through the use of non-racial underwriting factors." App. 7a. The court stated that to hold plaintiffs "to the plain language of the class definition would be overly formalistic," and held that plaintiffs had narrowed the application of the class definition to "overt race-distinct dual premiums and plans." *Id.*

The court then turned to the propriety of Rule 23(b)(2) certification based on plaintiffs' "request for an injunction prohibiting the further collection of discriminatory premiums." App. 9a. The court noted that Rule 23(b)(2) certification "'does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to money damages.'" *Id.* at 10a (quoting Fed. R. Civ. P. 23 advisory committee notes). But, the court overruled the district court's conclusion that in light of the number of policies that had lapsed, been paid, or been voluntarily

adjusted, the claim for injunctive relief "merely serve[d] as a bootstrap" for the "primary claim" of monetary damages. *Id.* The court concluded that the district court had analyzed the case as if it were applying the legal test for Rule 23(b)(2) certification followed by the Ninth and Second Circuits, see *id.* at 10a & n.10 (citing *Molski* v. *Gleich*, 318 F.3d 937, 950 (9th Cir. 2003), *Robinson* v. *Metro-North Commuter R.R.*, 267 F.3d 147, 163-64 (2d Cir. 2001)), instead of the different approach taken by the Fifth Circuit in *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). The court found that "defendants' and plaintiffs' experts estimate that between one million and 4.5 million of 5.6 million issued [industrial] policies remain in force," and concluded that "[a]lthough the exact number of class members continuing to pay discriminatory premiums is unknown," the proportion is sufficient . . . that the class as a whole is deemed properly to be seeking injunctive relief." App. 12a.

The court next rejected the Insurance Companies' argument that "plaintiffs' request for notice and opt-out [for class members] is a tacit admission that rule 23(b)(2) certification is inappropriate." App. 12a. The court believed that Fed. R. Civ. P. 23(d) authorizes the district courts "to provide notice and opt-out for any class action" and therefore that rule 23(b)(2) certification "should not be denied on the assumption that a rule 23(b)(3) class is the only means by which to protect class members" seeking monetary damages. *Id.* at 13a. The court also stated, however, that although "rule 23 does not explicitly extend these safeguards to rule 23(b)(2) classes, due process requires the provision of notice where a rule 23(b)(2) class seeks monetary damages." *Id.* at 12a-13a. On the other hand, the court noted that there is "no absolute right of opt-out in a rule 23(b)(2) class, 'even where monetary relief is sought and made available,'" *id.* at 13a. Thus, the court mandated that notice be provided and that opt-out rights be considered. The court rejected all arguments that Rule 23(b)(2) class certification was inappropriate because

"between one million and 4.5 million of 5.6 million" industrial life policies had terminated and thus a substantial portion of the class sought only money damages. *Id.* at 12a. The court stated that "to deny certification on the basis that the damages claims would be better brought as a rule 23(b)(3) class serves no function other than to elevate form over substance" and that Rule 23(b)(2) was not adopted "to compartmentalize claims for damages under rule 23(b)(3)." *Id.* at 14a & n.16.

Finally, the court rejected the district court's finding that "the requested monetary relief does not flow from liability to the class as a whole" and that its determinations would require "many and a variety of" personalized hearings. App. 15a. The court recognized that:

> This is not a case in which class members are entitled to a one-size-fits-all refund; assuming liability is established, individual damages will depend on the idiosyncrasies of the particular dual rate or dual plan policy. For example, the age at which a class member purchased a dual rate policy will have an impact on how long the insured paid premiums and consequently on the amount of damages. Some policies contain built-in benefits covering occurrences outside of death, such as loss of limb; others pay periodic dividends. As we have observed, some defendants, beginning in 1988, voluntarily adjusted premiums and benefits for some policies sold on a race-distinct basis. [*Id.* at 16a.]

The court believed that this problem could be solved with restitution grids (though plaintiffs had not produced the necessary grids). The court seemed to accept the Insurance Companies' statement that thousands of grids would be required (while ignoring their demonstration that even thousands of grids would not ultimately suffice), but nonetheless concluded that this was a "'mechanical task.'" App. 18a.

The court also refused to preclude class certification on the ground that individualized hearings would be necessary to decide whether a plaintiff's claim is barred by the statute of limitations. The court noted that "defendants have not sold dual plan or dual rate policies since the 1970's" and that "some class members purchased their policies as far back as the 1940's." App. 19a. Nonetheless, the court found that "[d]oubtless most class members, the majority of whom are poor and uneducated, remain unaware of defendants' discriminatory practices." *Id.* Further the court reasoned:

> To hold that each class member must be deposed as to precisely when, if at all, he learned of defendants' practices would be tantamount to adopting a *per se* rule that civil rights cases involving deception or concealment cannot be certified outside a two-or three-year period. [*Id.* at 20a.]

The court thus held that "a rebuttable presumption that the class lacks knowledge of defendants' concealment is warranted at the class certification stage." App. 44a. And, the court further held that the issue of whether the plaintiffs received constructive notice through the widespread publicity about defendants' policies could be decided on a national, classwide basis, rather than on a regional or individual basis. *Id.* at 20a-21a.

5. Judge Clement dissented. She found that there are two circumstances in which Rule 23(b)(2) certification is inappropriate:

First, Rule 23(b)(2) does not provide for procedural safeguards like notice and opt-out rights, primarily because the class is "presumed to be 'homogenous and cohesive' due to 'the *group* nature of the harm alleged and the *broad* character of the relief sought.'" App. 47a. Therefore, Judge Clement explained, if notice and/or opt-out rights seem to be necessary, certification under Rule 23(b)(2) is likely to be inappropriate.

Second, Rule 23(b)(2) only permits monetary relief in the form of "uniform group remedies." Uniform group remedies are consistent with Rule 23(b)(2) for two reasons: (1) they are "'capable of computation by means of objective standards,'" thus avoiding the need for "'complex individualized determinations'" and procedural safeguards like notice and opt-out rights, and (2) the group nature of the remedy ensures that the class remains "'homogenous and cohesive.'" App. 47a. Therefore, Rule 23(b)(2) class certification is inappropriate where the monetary relief requires a specific or time-consuming inquiry into the varying circumstances and merits of each class member's individual case.

Judge Clement found that Rule 23(b)(2) certification was clearly inappropriate here, both because notice and opt-out were likely to be required and because "a uniform group remedy is not possible" when plaintiffs seek "individualized remedies based on the specific characteristics of each policy and policyholder." App. 48a. As she noted, "[t]he parties appear to agree that: (1) the basis of Plaintiffs' suit is the issuance of hundreds of different industrial life insurance policies by several hundred Defendants over a period of 50 to 65 years; (2) Defendants ceased issuing such policies in the mid-1970s (or at the latest, the early 1980s); (3) many, if not most, of the industrial life insurance policies are no longer in effect, and (4) a large number of the remaining policies have been modified to some extent by Plaintiffs or Defendants." *Id.* at 49a. In this setting, injunctive relief is of "little consequence to many, if not most Plaintiffs." *Id.* Thus, injunctive relief does not predominate, and monetary relief is not incidental. She opined that the panel's holding would "undo the careful interplay between Rules 23(b)(2) and (b)(3)," requiring defendants "to pay what is effectively money damages, without the benefit of requiring plaintiffs to meet the rigorous Rule 23(b)(3) requirements." *Id.* at 49a-50a (quotation marks omitted).

6. The Fifth Circuit denied defendants' petition for rehearing and rehearing *en banc*, making only "minor adjustments" to its opinion. App. 3a. Judge Clement, however, added a second dissent. To her previous criticisms of the panel decision, she added that the panel decision had ignored two district court findings – *viz.*, "that money damages do not flow from liability to the class as a whole; and [] that a predominant proportion of the class does not seek injunctive relief." *Id.* at 22a. In order to certify the class, the court of appeals had effectively vacated these district court determinations without finding any "clear error" by the district court. Judge Clement stated that both of the district court's findings were well supported in the record, and therefore that the majority also erred in reversing the district court's denial of class certification on this basis. *Id.* at 22a-24a.

REASONS FOR GRANTING THE PETITION

I. THE PROPER STANDARD FOR RULE 23(b)(2) CERTIFICATION IS THE SUBJECT OF AN ACKNOWLEDGED, FULLY DEVELOPED CONFLICT AMONG THE COURTS OF APPEALS, FURTHER COMPLICATED BY DECISIONS OF THIS COURT.

There now exists a universally recognized, fully mature conflict among the courts of appeals concerning the proper standard for Rule 23(b)(2) certification of a class that seeks injunctive relief and monetary damages. All Circuits agree that the analysis of this issue commences with the Advisory Committee's vague instruction that Rule 23(b)(2) certification "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages," Fed. R. Civ. P. 23 advisory committee's note; but with that, all agreement ends. "Judicial efforts to give practical meaning to this passage have led to a dizzying array of approaches." Richard A. Nagareda, *The Preexistence*

Principle And The Structure Of The Class Action, 103 Colum. L. Rev. 149, 236 n.368 (2003). As the court below expressly recognized, the courts of appeals are polarized in their methodology for determining when, and under what conditions, Rule 23(b)(2) certification is appropriate. See App. 10a & n.10 (explaining that the Fifth Circuit's test, endorsed by at least four other circuits, had been "reject[ed]" by the Ninth and Second Circuits).

In *Allison*, the Fifth Circuit held that:

> monetary relief predominates in (b)(2) class actions *unless it is incidental to* requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief. [151 F.3d at 415 (citation omitted) (first emphasis added).][1]

This formulation of the test for certifying a Rule 23(b)(2) class has been adopted by the Third, Sixth, Seventh and Eleventh Circuits. See *Barabin* v. *Aramark Corp.*, No. 02-8057, 2003 U.S. App. Lexis 3532 (3d Cir. Jan. 24, 2003); *Coleman* v. *General Motors Acceptance Corp.*, 296 F.3d 443, 446-47 (6th Cir. 2002); *Jefferson* v. *Ingersoll Int'l, Inc.*, 195 F.3d 894 (7th Cir. 1999); *Murray* v. *Auslander*, 244 F.3d 807 (11th Cir. 2001).

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[1] Three objective factors are utilized in making this determination: (1) whether damages are "concomitant with, not merely consequential to, class-wide injunctive or declaratory relief"; (2) whether damages are "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances"; and (3) whether determining liability for damages would require "additional hearings to resolve the disparate merits of each individual's case" or would "introduce new and substantial legal or factual issues, [or] entail complex individualized determinations." *Allison*, 151 F.3d at 415.

The Second and Ninth Circuits, however, have explicitly rejected *Allison's* objective analysis in favor of an *ad hoc* balancing approach that focuses on the subjective purpose of the class. See *Robinson* v. *Metro N. Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001); *Molski* v. *Gleich*, 318 F.3d 937 (9th Cir. 2003). Under this approach, a district court must

> assess whether (b)(2) certification is appropriate in light of the "relative importance of the remedies sought, given all of the facts and circumstances of the case." The district court may allow (b)(2) certification if it finds in its "informed, sound judicial discretion" that (1) "the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed," *Allison*, 151 F.3d at 430 (Dennis, J., dissenting), and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy. [*Robinson*, 267 F.3d at 164 (citation and footnote omitted, alteration in original).]

The Second Circuit further explained that:

> [a]lthough the assessment of whether injunctive or declaratory relief predominates will require an ad hoc balancing that will vary from case to case, before allowing (b)(2) certification a district court should, at a minimum, satisfy itself of the following: (1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits. Insignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery. [*Id.* (footnote omitted).]

In the view of the Second and Ninth Circuits, the *ad hoc* approach gives district courts the freedom to exercise their discretion to achieve judicial efficiency on a case-by-case basis, unlike the "one-size-fits-all" approach adopted by the other courts of appeals. See *id.* at 165-66; *Molski*, 318 F.3d at 950. These two Circuits recognize that their test might compromise the Due Process rights of absent class members, but suggest that this concern be addressed by requiring notice and the opportunity to opt out of the damages phase of a proceeding. See, *e.g.*, *Robinson*, 267 F.3d at 166.

The conflict is even worse than it first appears. The *ad hoc* balancing approach of the Second and Ninth Circuits allows such substantial leeway in certification decisions that it fails meaningfully to constrain district courts' discretion and provides no certainty to parties. Indeed, "the term 'ad hoc balancing' is usually a term of derision for unprincipled adjudication rather than a label for an inquiry of constitutional dimensions." Samuel Issacharoff, *Preclusion, Due Process, And The Right To Opt Out of Class Actions*, 77 Notre Dame L. Rev. 1057, 1072 (2002). The *ad hoc* approach inevitably creates unpredictable and inconsistent results.

Equally to the point, there is substantial confusion and conflict in the application of both the "incidental damages" and *ad hoc* tests among the Circuits. This Court's decisions questioning the constitutionality of certifying a class seeking monetary damages under Rule 23(b)(2) are the source of that conflict. In response, some Circuits now authorize Rule 23(b)(2) certification for classes seeking injunctive relief and money damages and *also require that class members be provided with notice and the right to opt out* (the rights conferred under Rule 23(b)(3)).

In *Ticor Title Insurance Co.* v. *Brown*, 511 U.S. 117 (1994), in dismissing a writ of certiorari as improvidently granted, this Court said that there is "at least a substantial possibility" that "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which

permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not." *Id.* at 121. Similarly, *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), leaves the firm impression that a mandatory class seeking monetary damages should not be certified under Rule 23(b)(2) because such a class compromises the Due Process rights of absent class members. See, *e.g.*, *id.* at 846-47 (the "inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class" because the "legal rights of absent class members . . . are resolved regardless of either their consent, or . . . their express wish to the contrary"). See also *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811 n.3 (1985) (suggesting a constitutional right to opt out of class actions "which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments").

In light of *Ticor*, *Ortiz*, and *Shutts*, several Circuits are troubled by the possibility that certification of a Rule 23(b)(2) class seeking both injunctive and monetary relief may never be appropriate, because it binds all class members, without the safeguards of notice and the opportunity to opt out of the suit. See, *e.g.*, *Parker* v. *Time Warner Entm't Co.*, 331 F.3d 13, 23 (2d Cir. 2003) ("I am somewhat doubtful about the possibility of a *(b)(2)* class that would include monetary claims") (Newman, J., concurring).[2] Without clear guidance

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[2] *See also Coleman*, 296 F.3d at 447 ("Notwithstanding this apparent consensus that money damages are recoverable to some extent in a Rule 23(b)(2) class action, the Supreme Court has repeatedly expressed concern over the constitutionality of certifying a mandatory class that includes claims for money damages."); *Jefferson*, 195 F.3d at 897 ("It is an open question in this circuit – and in the Supreme Court – whether Rule 23(b)(2) *ever* may be used to certify a no-notice, no-opt-out class when compensatory or punitive damages are in issue." (citations omitted)); *Molski*, 318 F.3d at 948 ("[W]e recognize the Court's growing concerns regarding the certification of mandatory classes when monetary damages are involved.").

from this Court, however, the Circuits have felt constrained to follow existing precedent:

> We recognize that the Supreme Court's decision in [*Ticor*] casts doubt on the proposition that class actions seeking money damages can be certified under Rule 23(b)(2). . . . Were we writing on a clean slate, we might give further consideration to the extent to which monetary relief is available at all in 23(b)(2) class actions. However, in the absence of a clearer statement by the Supreme Court or en banc reconsideration of the issue, this panel is bound by circuit precedent. [*Allison*, 151 F.3d at 411 n.3].

Moreover, to address the constitutional issues raised by *Ortiz*, *Ticor*, and *Shutts*, the courts have devised a confusing array of approaches in applying Rule 23 to classes seeking both injunctive and monetary relief. Some courts permit divided certification, where the damages claims are certified under Rule 23(b)(3) and the equitable claims are certified under Rule 23(b)(2).[3] Some courts allow the certification of all issues under Rule 23(b)(2), but require that class members be provided with notice and the opportunity to opt out.[4] The decision below endorses the latter approach where Due Process poses an impediment to Rule 23(b)(2) certification. App. 12a-14a. The United States, in contrast, has taken the position that "Rule 23 plainly authorizes opt-outs only for classes certified under Rule 23(b)(3). No opt-out procedure is

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[3] The Eleventh Circuit has indicated that district courts may exempt non-incidental damages claims from class certification under Rule 23(b)(2), thus splitting the issues. *Murray*, 244 F.3d at 812. The Second and D.C. Circuits have also endorsed such a practice. *See Robinson*, 267 F.3d at 167; *Eubanks* v. *Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997).

[4] The Second Circuit authorizes a district court certifying a class under Rule 23(b)(2) to afford absent class members notice and opt-out rights for the damages portions of the proceedings. *Robinson*, 267 F.3d at 166, 167-69. This is also true in the Ninth and D.C. Circuits. *See Molski*, 318 F.3d at 950; *Eubanks*, 110 F.3d at 96.

authorized for Rule 23(b)(2) (or Rule 23(b)(1)) classes." Brief for the U.S. in Opposition at 11, *Thomas* v. *Albright*, 525 U.S. 1033 (1998) (No. 98-326).

These hybrid applications of Rule 23 directly respond to this Court's constitutional concerns about the certification of Rule 23(b)(2) and other mandatory classes. Fearful that class actions cannot satisfy the Rule 23(b)(3) predominance and superiority standards and anxious to certify some sort of class, the courts of appeals blur the distinctions between the different types of class action, jeopardizing the careful balance achieved by the drafters of the Rule. See *infra* at 23-28. Indeed, the decision below expressly endorses the elimination of the line between (b)(2) and (b)(3) classes. See App. 14a ("to deny certification on the basis that the damage claims would be better brought as a rule 23(b)(3) class serves no function other than to elevate form over substance. Indeed the interests of judicial economy are best served by resolving plaintiffs' claims for injunctive and monetary relief together"). How else could a court contemplate Rule 23(b)(2) certification of a class when it is undisputed that a substantial portion of the class – between 20% and 82% (*id.* at 12a-14a) – will not benefit from injunctive relief because it seeks *only* money damages?

The fundamental conflict on the standard for certifying a Rule 23(b)(2) class alone warrants this Court's intervention. When the confused multiplicity of responses to this Court's constitutional concerns voiced in *Ticor*, *Ortiz*, and *Shutts* are added to the mix, the necessity for this Court's clarification becomes overwhelming. This case will permit the Court to establish the appropriate standard for Rule 23(b)(2) certification, to clarify the line between (b)(2) and (b)(3) classes, and to instruct the courts of appeals on the appropriate accommodation of constitutional concerns in applying Rule 23.

II. THE PROMPT RESOLUTION OF THE RECURRING AND IMPORTANT QUESTION PRESENTED IS CRITICAL TO THE FAIR AND UNIFORM ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS.

Class actions have been one of the most important developments in civil litigation in the past 35 years. They touch virtually every area of substantive law, involve issues of enormous potential economic or social import, and often call into question the structure, operation, and survival of entire businesses or industries. There are thousands of class actions pending, and more than 3000 additional class actions are filed in federal district courts every year.[5]

Because Rule 23(b)(2) classes "do not need to meet the more stringent 23(b)(3) requirements of predominance and superiority, certification under the mandatory classes is viewed as easier, and more desirable." Linda S. Mullenix, *No Exit: Mandatory Class Actions In The New Millennium And The Blurring Of Categorical Imperatives*, 2003 U. Chi. Legal F. 177, 215; see *id.* at 218. Thus, class counsel seeking money damages increasingly recast their allegations as claims for injunctive relief in order to obtain certification under Rule 23(b)(2). *Id.* at 217-24.

In a multitude of cases, affecting thousands, if not millions, of individuals, trial judges must decide whether to certify a proposed class under Rule 23(b)(2). To do so fairly and appropriately, they must know what a plaintiff is required to prove and what the court must find in order to satisfy the Rule's requirements. But it is precisely this question on which the federal courts are in conflict.

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[5] The annual reports on the Judicial Business of the United States Court produced by the Judicial Conference contain statistics on class actions. They are available at http://www.uscourts.gov/judbususc/judbus.html (last visited July 1, 2004).

Moreover, roughly two-thirds of the States model their class actions rules on Rule 23. See Robert H. Klonoff & Edward K.M. Bilich, *Class Actions and Other Multi-Party Litigation*: *Cases And Materials* 439 (2000). Accordingly, these states vicariously experience the federal court's conflict on this recurring question. And, to the extent the conflict has constitutional implications, see *supra* at 17-19 & *infra* at 24, the states' application of their Rule 23 analogues presents a federal question. So long as widespread uncertainty about the Rule 23(b)(2) standard exists, the issue will frequently recur and consume not only litigants' resources but also scarce judicial resources, particularly in light of the availability of interlocutory appeal under Rule 23(f).

In addition, the overwhelming consequences of class certification increase both the frequency with which the issue recurs and the importance of the certification decision. Class certification raises the stakes of litigation exponentially, and often determines whether a case will settle, be tried, or simply disappear. Indeed, the certification of a large class "may so increase the defendant's potential damages liability and litigation costs that it will be coerced to settle a case without regard to the merits of his defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). See also Fed. R. Civ. P. 23 advisory committee's note ("[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"); *Manual for Complex Litigation (Third)* § 33.26 n.1056 (2000).[6] That is why Rule 23

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[6] Indeed, as an empirical matter, aggregation of claims makes it more probable that a defendant will be found liable and results in significantly higher damage awards. *See Manual for Complex Litigation* § 33.26 n.1056; Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions,* 73 Judicature 22 (1989). *See also* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 & n.85 (1995).

authorizes class certification only if, after a "rigorous analysis," the district court "finds" that the prerequisites for certification have been met. *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 161 (1982).

The ubiquity and importance of Rule 23, in combination with the coercive effects of class certification, make conflict and uncertainty in its application particularly intolerable. The Federal Rules of Civil Procedure are intended to establish uniform treatment of all procedural matters in federal cases. Conflicting and chaotic interpretation and application of these Rules is fundamentally unfair to litigants in class cases. Neither plaintiffs nor defendants should be confronted with less favorable rules depending upon whether a nationwide class action is brought in New York, New Orleans, Chicago, or Los Angeles. The current lack of uniformity simply encourages unseemly forum shopping by plaintiffs eager to leverage class certification into coercive settlements. This problem is particularly acute in class actions because plaintiffs often have limitless options as to where to bring the lawsuit. Thus, the persistence of materially conflicting standards among the Circuits unjustly allows plaintiffs to choose the certification standard most favorable to them.

Finally, the courts of appeals' interpretations of Rule 23 contravene the meaning and intent of the Rule and create fundamentally unfair and potentially unconstitutional results. Rule 23's structure reflects an underlying concern for the varying nature of the interests of class members participating in a class action, class members who do not participate, and defendants, depending upon the nature of the injury and the relief sought. Both that concern and that structure have been hopelessly compromised by the current state of the law applying Rule 23(b)(2).

Rule 23(b)(2) was intended to address cases where broad, classwide injunctive relief is necessary, while Rule 23(b)(3) is intended to address large-scale litigation for money damages. Under Rule 23(b)(2), class members forfeit their individual

legal rights to litigate damages claims because a (b)(2) class is presumed to be a homogenous, cohesive group with few, if any, conflicting interests among its members. This homogeneity breaks down once significant and differentiated monetary relief is sought by class members.[7] In contrast, Rule 23(b)(3) class members must receive notice and opt-out rights so that they can pursue their claims for money damages in individual lawsuits without being bound by membership in a class. These requirements are based on constitutional considerations of Due Process that are implicated by actions for money damages. See *Ticor Title Ins. Co.*, 511 U.S. at 121; *Ortiz*, 527 U.S. at 844-48; *Shutts*, 472 U.S. at 811-12.

But Rule 23's structure – *viz.*, the boundary between (b)(2) and (b)(3) classes – is vanishing. First, classes that seek money damages are being certified under (b)(2), instead of under (b)(3). The decision below exemplifies this development. All parties, the district court, and the court of appeals have agreed that a substantial portion of industrial life policies have been terminated (between 20% and 82%) and that class members with terminated policies would not receive *any* benefit from injunctive relief. App. 9a-14a. Yet the court held that even in that setting, injunctive relief may

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[7] In the paradigm case for injunctive relief against wrongful governmental or institutional actions, the individual plaintiff does not have an exclusive right to assert and control the outcome of litigation of an autonomous legal claim; that individual is a symbol of the harm caused by the conduct. *See* Issacharoff, *supra*, at 1058-59 ("To give but the most obvious example, a school desegregation challenge may or may not succeed, but if it does it will establish the wrongful conduct directly across a group of affected school children"; "it would be nonsensical to claim that any one child has an autonomous right to an independent outcome of the litigation," because "no child has an individual stake in the outcome of that litigation separate from that of the other similarly situated children"). It is precisely because a claim for injunctive relief under 23(b)(2) does not generally belong to an individual plaintiff that the Due Process considerations giving rise to notice and opt out requirements are not problematic, when the standard for certification is properly applied.

predominate and Rule 23(b)(2) certification is appropriate, stating that because "*the proportion* [of class members that would benefit from injunctive relief] is sufficient . . . the class as a whole is deemed properly to be seeking injunctive relief." *Id.* at 12a (emphasis supplied). Rule 23 simply does not authorize (b)(2) certification of a class in which numerous members will receive *no* benefit from an injunction and benefit *"exclusively"* from receiving damages. See Fed. R. Civ. P. 23 advisory committee's note ((b)(2) "does not extend to cases in which the appropriate final relief relates *exclusively* or predominantly to money damages") (emphasis supplied).

In addition, and independently, the court of appeals reversed the denial of class certification even though plaintiffs had not calculated the money damages for class members or provided a formula for the millions of calculations. Individualized determinations are required to determine the damages of plaintiffs here; indeed, the court of appeals agreed that "individual damages will depend on the idiosyncrasies of the particular dual rate or dual plan policy." App. 16a. Even applying plaintiffs' faulty grid damages proposal, determining damages for class members would require the creation of thousands of "grids" containing a multitude of variables. *Id.* at 17a. There is also a substantial statute of limitations defense; and if any of the 280 Companies are found to have concealed their practices (despite filing policy forms and reserve calculations relying on mortality tables related to race with state regulators), then each class member's right to, and period of, tolling will have to be determined based upon when he or she obtained actual or constructive knowledge of the challenged practices. The consolidated treatment of class members' claims thus cannot be reconciled with the structure of Rule 23 or the Insurance Companies' Due Process right to put on individualized defenses, including affirmative defenses. By no stretch of reason or language can the

damages in this case be deemed "incidental" to the injunction sought.[8]

Moreover, where, as here, millions of class members can only receive compensatory damages, the Due Process rights of these class members may be violated unless those class members receive notice and the right to opt out of the class. See *Ticor Title Ins. Co.*, 511 U.S. at 121. As noted, several courts of appeals purport to cure the Due Process problems by *both* (a) certifying a class that seeks money damages under Rule 23(b)(2) *and* (b) requiring individual notice and opt-out rights – to wit, the rights provided to members of Rule 23(b)(3) classes. Indeed, in the decision below, the Fifth Circuit acknowledged its elimination of the line between 23(b)(2) and 23(b)(3) classes, citing "the futility of the district court's and the dissent's inquiry as to whether the 'prime goal' of the class is injunctive or monetary relief," App. 14a, and opining that (b)(2) and (b)(3) "work in tandem," *id.* & n.16. The court thus concluded that a class seeking monetary damages may be certified under 23(b)(2) by engrafting the notice and opt-out provisions of (b)(3) where necessary. See also *Eubanks*, 110 F.3d at 93 & n.9; *Linney* v. *Cellular Alaska P'ship*, 151 F.3d 1234, 1242 n.6 (9th Cir. 1998); 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4.15 (4th ed. 2002).

This practice is utterly inconsistent with the structure of Rule 23, which authorizes mandatory (b)(2) classes only when, and precisely because, the class seeks relief that is class-wide or that flows automatically to the class as a whole,

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[8] The court below appears to believe that it could allow 23(b)(2) certification even if there was only a hope that plaintiffs would somehow provide a formula or otherwise show that class members' damages were incidental in the future. But classes cannot be certified in the hope that plaintiffs' counsel will ultimately satisfy Rule 23's prerequisites. Those prerequisites must be met or certification must be denied. *See, e.g.*, *Falcon*, 457 U.S. at 160 ("actual, not presumed, conformance with Rule 23[ ] remains . . . indispensable").

without individualized determinations of entitlement, amount, or affirmative defenses. See *Amchem*, 521 U.S. at 620 ("[c]ourts are not free to amend a rule outside the process Congress ordered"). The "doctrinal incoherence has blurred the categorical distinctions among class categories that the Advisory Committee carefully promulgated in 1966. Therefore, the entire class action rule has been rendered analytically incoherent. It has become increasingly difficult to distinguish among the 23(b)(1), (b)(2), and (b)(3) class categories in any meaningful way." Mullenix, *supra*, at 181.

In addition, the device of certifying a class seeking money damages under 23(b)(2)'s lenient standard and solving the plaintiffs' constitutional problems by requiring notice and opt-out rights deprives the defendant of the protection that the more rigorous predominance and superiority standard of 23(b)(3) mandates *before certification of a massive class seeking overwhelming money damages with its attendant coercive effects*. See also Richard A. Epstein, *Class Actions: Aggregation, Amplification And Distortion*, 2003 U. Chi. Legal F. 475, 512-13 ("the ability of the defendant to mount an effective defense on liability in each individual case may be effectively compromised in order to allow the class action to proceed as such").

In sum, the fundamental problem with the court of appeals' approach is that it authorizes the circumvention of Rule 23(b)(3) requirements in cases where their application is required by Rule 23 and where they are absolutely essential to protect the Due Process rights of plaintiffs and defendants. In fact, in interpreting Rule 23(b)(2):

> The sensible rule here holds that injunctive relief could never predominate when individual damages actions are brought. That rule creates the right "bright-line" rule for this area and avoids expensive case-by-case determinations. On that view, Rule 23(b)(2) certification becomes permissible only where the plaintiff's demand for monetary relief is limited to a demand for incidental

> damages which do not require extensive additional fact-finding, but which can be done (as with lost interest) by use of simple computational devices. [Epstein, *supra*, at 511.]

Thus, Rule 23 would be best implemented "by confining the mandatory class for injunctive or declaratory relief to – shockingly enough – claims for injunctive or declaratory relief." Nagareda, *supra*, at 235. This is not the current practice in several circuits, including the Fifth Circuit.

A final, substantial problem in the current jurisprudence of Rule 23 is that the courts distort substantive law in order to find money damages incidental. This case exemplifies that problem, too.

Here, the Insurance Companies raised a statute of limitations defense. In response, plaintiffs asserted that some of the 280 Companies comprising the Insurance Companies fraudulently concealed discriminatory rates and plans, leaving plaintiffs without knowledge of such rates and plans until recently. This situation necessarily requires a determination of whether there was concealment and of the date that individual class members gained actual or constructive knowledge of the alleged discrimination – determinations that would have precluded certification. Thus, the court of appeals decided that class members' actual or constructive knowledge of the Companies' alleged discrimination could be assessed on a national, rather than a regional or individual, basis. But see, *e.g.*, *McIntyre* v. *United States*, 367 F.3d 38, 59 (1st Cir. 2004) ("the 'knew or reasonably should have known' question must be asked individually, as to the information available to someone in each plaintiff's situation"); *id.* at 60 ("[w]here there are several plaintiffs and they do not live in the same geographical area, and public notice of the underlying facts is restricted to certain areas, geography is a factor to be considered"); *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998). The court of appeals' national approach to this issue

deprived the Insurance Companies of an affirmative defense to plaintiffs' claims.

But, the Rules of Civil Procedure cannot alter substantive law in this way. See Rules Enabling Act, 28 U.S.C. § 2072(b). Here, "[t]he procedural tail has wagged the substantive dog. The aggregation of claims has resulted in a powerful distortion of the substantive law in ways that systematically favor plaintiffs over defendants in contradiction to the basic model that should govern these cases." Epstein, *supra*, at 514.

* * * *

Rule 23 is a critically important procedural rule, not least because of the substantial, often determinative effect that decisions under that Rule have on the merits of important litigation affecting hundreds or, as here, millions of parties with claims alleged to involve staggering sums. A conflict concerning an important aspect of Rule 23's interpretation and application is particularly worthy of this Court's review. The specific conflict that exists on the proper standard and criteria for certification under Rule 23(b)(2) undermines the Rule's purpose, for it has added uncertainty and further unfairness to the coercive force of a certification order and corrupted the intended structure and administration of Rule 23.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1, 2004

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 02-30540

In the Matter of: MONUMENTAL LIFE INSURANCE COMPANY, INDUSTRIAL LIFE INSURANCE LITIGATION.

MATTIE BRATCHER, *et al.*,
Plaintiffs,

MATTIE BRATCHER; JOHN BRATCHER; CAROLINE BROWN, on Behalf of Herself and All Others Similarly Situated; MARY SUE TRUESDALE; MAXINE CASH, on Behalf of Herself and All Others Similarly Situated; MILDRED BUFORD, Also Known as MILDRED GAMLIN, on Behalf of Herself and All Others Similarly Situated,
Plaintiffs-Appellants,

v.

NATIONAL STANDARD LIFE INSURANCE COMPANY, *et al.*,
Defendants,

MONUMENTAL LIFE INSURANCE COMPANY,
Defendant-Appellee.

In the Matter of: UNITRIN, INC., INDUSTRIAL LIFE INSURANCE LITIGATION.

ROSIE LEE COTHRAN, *et al.*,
Plaintiffs,

ELIZABETH WALKER,
Plaintiff-Appellant,

v.

SECURITY INDUSTRIAL INSURANCE COMPANY, *et al.*,
Defendants,

MONUMENTAL LIFE INSURANCE COMPANY,
Defendant-Appellee.

In the Matter of: AMERICAN NATIONAL INSURANCE COMPANY, INDUSTRIAL LIFE INSURANCE LITIGATION.

ROSE MARY ROACH, on Behalf of Herself and All Others Similarly Situated,

Plaintiff-Appellant,

v.

AMERICAN NATIONAL INSURANCE COMPANY,
Defendant-Appellee.

In the Matter of: WESTERN & SOUTHERN LIFE INSURANCE CO., INDUSTRIAL LIFE INSURANCE LITIGATION.
JOSEPH BELL, ETC., *et al.*,

Plaintiffs,

JOSEPH BELL, Individually and on Behalf of Others Similarly Situated; WILLA ELLIS, DOCTOR; THELMA WALKER OATIS, on Behalf of Themselves and All Others Similarly Situated; ALMA HYDE,

Plaintiffs-Appellants,

v.

WESTERN & SOUTHERN LIFE INSURANCE COMPANY,
Defendant-Appellee.

April 2, 2004

Appeal from the United States District Court
for the Eastern District of Louisiana.

ON PETITION FOR REHEARING

Before SMITH, DENNIS and CLEMENT, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

The petition for panel rehearing is DENIED, and no judge in regular active service having requested that the court be polled on rehearing en banc, the petition for rehearing en banc is DENIED. The opinion, 343 F.3d 331 (5th Cir.2003), is withdrawn for the limited purpose of making minor adjustments in the analyses contained in parts III.A, III.B, and V. Although by far the greater portion of the opinion remains intact, we now issue a new opinion, as follows:

* * * *

In what may be the ultimate negative value class action lawsuit,[1] plaintiffs challenge defendants' alleged practice of paying lower benefits and charging higher premiums to blacks in the sale of low-value life insurance. The district court denied plaintiffs' motion to certify a class pursuant to Fed.R.Civ.P. 23(b)(2), finding, *inter alia*, that the majority of class members would not benefit from injunctive relief. Based primarily on *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir.1998), we reverse and remand.

I.

This is a consolidation of civil rights actions against three life insurance companies: Monumental Life Insurance Company ("Monumental"), American National Insurance Company ("ANICO"), and Western and Southern Insurance

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[1] A "negative value" suit is one in which class members' claims "would be uneconomical to litigate individually." *Phillips Petroleum v. Shutts*, 472 U.S. 797, 809, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir.1996).

Company ("Western and Southern"). Plaintiff policyowners, all of whom are black, allege that, for decades, defendants discriminated against them in the sale and administration of low-value life insurance policies, known as industrial life policies,[2] that have face amounts of $2000 or less and require small weekly or monthly premiums. Defendants comprise over 280 companies that issued industrial life policies over a fifty- to sixty-five-year period.[3]

Plaintiffs allege two overtly discriminatory practices. First, they accuse defendants of placing blacks in industrial policies offering the same benefits as do policies sold to whites, but at a higher premium (dual rates). Second, defendants allegedly placed blacks in specially-designed substandard industrial policies providing fewer or lower benefits than do compare-able plans sold to whites (dual plans). These practices are memorialized in the insurer's rate books and records, which explicitly distinguish dual rate and dual plan policies by race.[4] Although, before filing their motion for class certification, plaintiffs challenged the insurers' alleged practice of charging blacks substandard premiums because of non-racial underwriting factors, such as mental condition, occupation, socioeconomic status, educational level, living conditions,

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[2] Defendants defend this practice on the basis that (1) the race-distinct pricing was justified; (2) the practice was approved by regulators; (3) the racially discriminatory policies were no more profitable than were those sold to whites; and (4) some of the discriminatory policies were remediated.

[3] Over the years, defendants have acquired other insurance companies and thereby assumed blocks of in-force insurance policies issued by them. Monumental currently administers policies issued by 200 different companies, while Western and Southern administers policies issued by approximately 80 companies. ANICO has assumed an indeterminate number of in-force policies.

[4] As an example, a 1962 ANICO rate book shows that, for a twenty-year-old black, a $500 "20 Pay Life" industrial policy charged a weekly premium of $0.41, while a twenty-year-old white paid only $0.32.

and personal habits, plaintiffs no longer complain of such pretextual underwriting procedures.

Defendants state that they issued "hundreds, perhaps thousands, of different industrial life insurance products" encompassing a countless variety of underwriting standards. It is undisputed that all companies that sold dual rate or dual plan policies have not done so since the early 1970's. Also, as early as 1988, some insurers voluntarily adjusted premiums and/or death benefits to equalize the amount of coverage per premium dollar. Still, plaintiffs estimate that over 4.5 million of the 5.6 million industrial policies issued by defendants remain in-force; many other policies have been terminated, surrendered, or paid-up without remediation.[5] Defendants' expert estimates that the ratio of terminated policies to outstanding policies is approximately five to one, meaning that slightly more than one million policies remain in-force.

Plaintiffs sued for violations of 42 U.S.C. §§ 1981 and 1982, seeking (1) an injunction prohibiting the collection of discriminatory premiums, (2) reformation of policies to equalize benefits, and (3) restitution of past premium overcharges or benefit underpayments. Pursuant to 28 U.S.C. § 1407, the Judicial Panel for Multidistrict Litigation ("MDL") consolidated the actions against Monumental and transferred them to the Eastern District of Louisiana for pre-trial proceedings. Later, the MDL Panel took the same action with the cases against ANICO and Western and Southern.

Plaintiffs moved for certification of a class pursuant to rule 23(b)(2), requesting that class members be provided notice and opt-out rights. The district court denied certification, finding that plaintiffs' claims for monetary relief predominate over their claims for injunctive relief, making rule 23(b)(2)

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[5] Plaintiffs allege that Monumental has not adjusted any of its dual rate or dual plan policies. ANICO adjusted one of its four discriminatory "Standard No. 3 plans."

certification inappropriate. The court also found that, given the large number of companies and policies involved, individualized hearings were necessary to determine damages and whether claims were barred by the statute of limitations. Defendants sought, and this court granted, interlocutory review pursuant to Fed.R.Civ.P. 23(f).

II.

Defendants contend that class members cannot be readily identified by way of the class definition. A precise class definition is necessary to identify properly "those entitled to relief, those bound by the judgment, and those entitled to notice." 5 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.21[6], at 23-62.2 (3d ed.2003); *see DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir.1970). Some courts have stated that a precise class definition is not as critical where certification of a class for injunctive or declaratory relief is sought under rule 23(b)(2).[6] Where notice and opt-out rights are requested, however, a precise class definition becomes just as important as in the rule 23(b)(3) context.

Plaintiffs sought to certify a class comprised of "[a]ll African-Americans who own, or owned at the time of policy termination, an industrial life insurance policy that was issued as a substandard plan or at a substandard rate." Defendants argue that the plain language of that definition does not

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[6] *See Battle v. Commonwealth*, 629 F.2d 269, 271 n. 1 (3d Cir.1980) ("Where . . . the class action seeks only injunctive or declaratory relief, for which the notice provision of Fed.R.Civ.P. 23(c)(2) is not mandatory, the district court has even greater freedom in both the timing and specificity of its class definition."); *Rice v. City of Philadelphia*, 66 F.R.D. 17, 19 (E.D.Pa.1974) ("[T]he precise definition of the [(b)(2)] class is relatively unimportant. If relief is granted to the plaintiff class, the defendants are legally obligated to comply, and it is usually unnecessary to define with precision the persons entitled to enforce compliance. . . .").

comport with the class plaintiffs seek to certify. As we have noted, before moving for certification plaintiffs had included not only blacks who had purchased dual rate or dual plan policies, but also blacks who allegedly were forced into substandard plans, or forced to pay substandard rates, through the use of non-racial underwriting factors.

In their motion for certification, plaintiffs narrowed the class, stating that "[t]he proposed class *does not* include those who may have been subjected to covert socio-economic forms of racial discrimination." Plaintiffs specified that "the term 'substandard' applies to overt race-distinct dual premiums and plans, not to policies called substandard because of other factors such as socio-economic underwriting."

We agree with defendants' observation that, as written, the class definition includes all blacks who paid substandard rates or were issued substandard plans. The definition makes no distinction between class members who purchased dual rate or dual plan policies and those forced into substandard rates or substandard plans through the use of pretextual underwriting practices. In other words, one must look to the certification motion for an adequate description of the proposed class.

Holding plaintiffs to the plain language of the class definition would be overly formalistic. In the first place, the district court, in denying certification, apparently did not consider the pretextual claims as part of the proposed class. Though referring to the "mass of policies involved" and the "differing underwriting practices among some 280 companies," the court stated that in calculating damages, individualized hearings were necessary to account for the idiosyncracies of each policy. At no point did the court suggest that individualized hearings were necessary to determine liability, as would be necessary if pretextual underwriting claims were part of the class.

Second, holding plaintiffs to the plain language of their definition would ignore the ongoing refinement and give-and-take inherent in class action litigation, particularly in the formation of a workable class definition. District courts are permitted to limit or modify class definitions to provide the necessary precision.[7] If the class is certified on remand, we trust that the plaintiffs or district court will amend the definition accordingly.

Defendants also argue that the definition terms "own, or owned," "industrial life insurance policy," "substandard plan," and "substandard rate" are ambiguous, further complicating identification of class members. This argument, too, is overly formalistic. *See Forbush*, 994 F.2d at 1105-06.

Plaintiffs' filings in the district court clarified any ambiguities by stating that "the class is limited to industrial policies sold at a substandard (i.e., higher) rate for African-Americans and a lower rate for Caucasians, or as a substandard plan (i.e., a more costly plan) for African-Americans and a corresponding less expensive plan for Caucasians." Plaintiffs define industrial life insurance policies as "(1) policies labeled as 'industrial' or (2) those policies with a face amount of less than $2,000.00 and weekly or monthly home premium collection." Defendants were provided adequate notice and discovery by which to argue that the narrowed class cannot be certified pursuant to rule 23(b)(2).

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[7] *See, e.g., Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir.1993) ("A court is not bound by the class definition proposed in the complaint and should not dismiss the action simply because the complaint seeks to define the class too broadly."); *Harris v. Gen. Dev. Corp.*, 127 F.R.D. 655, 659 (N.D.Ill.1989) ("[I]t is certainly within this court's discretion to limit or redefine the scope of the class."); *Meyer v. Citizens & S. Nat'l Bank*, 106 F.R.D. 356, 360 (M.D.Ga.1985) ("The Court has discretion in ruling on a motion to certify a class. This discretion extends to defining the scope of the class.") (citations omitted).

III.

We review for abuse of discretion the denial of class certification. *Jenkins v. Raymark Indus.*, 782 F.2d 468, 471-72 (5th Cir. 1986). "Implicit in this deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation." *Allison*, 151 F.3d at 408. We review *de novo* however, the question whether the district court applied the correct legal standard. *Forbush*, 994 F.2d at 1104.

All classes must satisfy the four baseline requirements of rule 23(a): numerosity, commonality, typicality, and adequacy of representation.[8] Fed.R.Civ.P. 23(a). Assuming these requirements are satisfied, a rule 23(b)(2) class may be certified if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). Plaintiffs premise rule 23(b)(2) certification on their request for an injunction prohibiting the further collection of discriminatory premiums.

A.

The court observed that "many" proposed class members—those whose policies have lapsed, those whose policies have already been voluntarily adjusted by defendants, and those whose death benefits already have been paid—would not benefit from injunctive relief. The court concluded that "this is a case in which individuality overrides any bland group-think, and money becomes the prime goal . . . not injunctive relief." Rule 23(b)(2) certification is improper, the court held,

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[8] The district court noted that "oral argument unveiled serious adequacy of representation issues," but did not rely on this basis in denying certification.

where the class's request for injunctive relief merely serves as a bootstrap for a claim of monetary damages.

In *Allison*, we carefully explained the statement in the advisory committee notes that rule 23(b)(2) certification "does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to money damages." Fed.R.Civ.P. 23 advisory committee notes (emphasis added).[9] *Allison* did not hold, as the district court believed, that monetary relief predominates where it is the "prime goal" or a mere bootstrap to injunctive relief. Instead, "determining whether one form of relief actually predominates in some quantifiable sense is a wasteful and impossible task that should be avoided." *Allison*, 151 F.3d at 412 (citing 7A Charles A. Wright et al., Federal Practice and Procedure § 1775, at 470 (2d ed.1986)). In other words, certification does not hinge on the subjective intentions of the class representatives and their counsel in bringing suit.[10]

Instead, *Allison* looked to the nature of the rule 23(b)(2) device in defining when monetary relief predominates. That rule's focus on injunctive and declaratory relief presumes a class best described as a "homogenous and cohesive group with few conflicting interests among its members." *Id.* at 413.

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[9] *Allison*, 151 F.3d at 411-12 ("The Advisory Committee Notes make no effort to define or explain the concept. Interpreting the term literally, predominant means 'controlling, dominating, [or] prevailing.' But how that translates into a workable formula for comparing different types of remedies is not at all clear.") (citation omitted).

[10] *But see Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir.2003) (expressly rejecting *Allison* and instead "focus[ing] on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit"); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 163-64 (2d Cir.2001) (stating that rule 23(b)(2) certification is appropriate only where "reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought" and "the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits").

Class certification centers on the defendants' alleged unlawful conduct, not on individual injury. Once monetary damages enter the picture, however, class cohesiveness is generally lost, because "[m]onetary remedies are more often related directly to the disparate merits of individual claims." *Id.* (citations omitted). Where the need to address the merits of individual claims requires separate hearings, the efficiency gained by class litigation is lost.

In *Allison*, therefore, we held, *id.* at 415, that monetary relief, to be viable in a rule 23(b)(2) class, must "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." Monetary relief must be incidental, meaning that it is "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances."[11] *Id.* Additional hearings to resolve "the disparate merits of each individual's case" should be unnecessary. *Id.*

Of course, certification under rule 23(b)(2) is appropriate only if members of the proposed class would benefit from the injunctive relief they request. The question whether the proposed class members are properly seeking such relief is antecedent to the question whether that relief would predominate over money damages.

In *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970 (5th Cir.2000), we considered a proposed rule 23(b)(2) class of one million consumers who claimed to seek injunctive relief, alleging that defendant had employed various unlawful practices to coerce payment of otherwise-discharged pre-bankruptcy debt. Before applying the *Allison* predominance test, however, we observed that "[m]ost of the class

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[11] The predomination requirement serves two basic purposes, namely the interests of class members who may wish to pursue monetary claims individually, and interests of judicial economy. *Allison*, 151 F.3d at 415.

consists of individuals who do not face further harm from Sear's [*sic*] actions." *Id.* at 978. Because only a negligible proportion of proposed class members were properly seeking injunctive relief, we held that rule 23(b)(2) certification was inappropriate.

Here, by contrast, defendants' and plaintiffs' experts estimate that between one million and 4.5 million of 5.6 million issued policies remain in-force. Although the exact number of class members continuing to pay discriminatory premiums is unknown, the proportion is sufficient, absent contrary evidence from defendants, that the class as a whole is deemed properly to be seeking injunctive relief.

B.

Bolin reflects a concern that plaintiffs may attempt to "shoehorn damages actions into the Rule 23(b)(2) framework, depriving class members of notice and opt-out protections."[12] Indeed, we suggested in *Allison*, 151 F.3d at 413, that monetary relief may predominate "when its presence in the litigation suggests that the procedural safeguards of notice and opt-out are necessary." Defendants seize on this point, arguing that plaintiffs' request for notice and opt-out is a tacit admission that rule 23(b)(2) certification is inappropriate. This ignores the discretion given a district court to order notice and opt-out rights when certifying a rule 23(b)(2) class. *See* Fed.R.Civ.P. 23(d)(2).

As "fundamental requisites of the constitutional guarantees of procedural due process," *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), notice and opt-out are mandatory for damage classes certified under rule 23(b)(3). Though rule 23 does not explicitly extend

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[12] *Bolin*, 231 F.3d at 976; *see also McManus v. Fleetwood Enters.*, 320 F.3d 545, 554 (5th Cir.2003) ("[C][ ]lass members would potentially receive a poor substitute for individualized money damages, without the corresponding notice and opt-out benefits of Rule 23(b)(3). . . .").

these safeguards to rule 23(b)(2) classes, due process requires the provision of notice where a rule 23(b)(2) class seeks monetary damages.[13]

On the other hand, there is no absolute right of opt-out in a rule 23(b)(2) class, "even where monetary relief is sought and made available." *Penson*, 634 F.2d at 994; *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 505-07 (5th Cir. Jan.1981). Under our precedent, should the class be certified on remand, class members must be provided adequate notice, and the district court should consider the possibility of opt-out rights.[14]

Allison's statement that monetary relief may predominate where notice and opt-out are necessary reflects only the inescapable fact that such safeguards are most appropriate where individual issues diminish class cohesiveness. Then, conflicts among class members and issues of adequate representation are most likely to surface. Rule 23(b)(3) is the default vehicle for certification, but only because notice and opt-out rights are mandatory components. A district court is empowered by rule 23(d)(2) to provide notice and opt-out for any class action, so rule 23(b)(2) certification should not be denied on the mistaken assumption that a rule 23(b)(3) class is the only means by which to protect class members.[15]

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[13] *Allison*, 151 F.3d at 412 n. 4 (citing *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 436-38 (5th Cir.1979)); *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. Unit B Jan.1981). The type of notice afforded to rule 23(b)(2) class members seeking monetary relief will not always be "equivalent to that required in (b)(3) actions." *Johnson*, 598 F.2d at 438.

[14] *See Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898 (7th Cir.1999) (contemplating the use of opt-out rights for a rule 23(b)(2) class); *Eubanks v. Billington*, 110 F.3d 87, 94 (D.C.Cir.1997) (holding that the language of rule 23 is sufficiently flexible to afford district courts the discretion to grant opt-out rights for rule 23(b)(2) classes).

[15] One of the dissent's two reasons for finding class certification inappropriate concerns our supposed "suggestion" that notice and opt-out

All of this further demonstrates the futility of the district court's and dissent's inquiry as to whether the "prime goal" of the class is injunctive or monetary relief. The rule 23(b)(2) predominance requirement, by focusing on uniform relief flowing from defendants' liability, "serves essentially the same functions as the procedural safeguards and efficiency and manageability standards mandated in (b)(3) class actions." *Allison*, 151 F.3d at 414-15. Therefore, to deny certification on the basis that the damage claims would be better brought as a rule 23(b)(3) class serves no function other than to elevate form over substance.[16] Indeed, interests of judicial economy are best served by resolving plaintiffs' claims for injunctive and monetary relief together.

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rights are necessary. In *Allison*, 151 F.3d at 414, however, we explained that "[t]he fact that the predomination requirement serves to protect the rights of class members . . . does not imply . . . that the availability of monetary relief in a(b)(2) class action depends solely or directly on whether class members are entitled to notice or opt-out rights." As mentioned, this court's precedent requires that notice be provided where a rule 23(b)(2) class seeks damages, *see supra* note 13 and accompanying text, so it is circular for the dissent to argue notice as a basis for denying certification. Our direction to the district court to consider the possibility of opt-out rights speaks nothing as to whether such rights are necessary or even desirable.

[16] Our view that the rule 23(b)(2) and (b)(3) devices may work in tandem is strengthened by the roots of subdivision (b)(2), which was added "to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil rights area." 7A Charles A. Wright et al., Federal Practice and Procedure § 1775, at 470 (2d ed.1986). Before its adoption, the rules made no explicit reference to class actions involving injunctive or declaratory relief, and "there was some uncertainty whether a class action seeking one of those remedies was an appropriate device for vindicating civil rights." *Id.* at 470-71. Rule 23(b)(2) was adopted to facilitate the use of injunctive relief, not to compartmentalize claims for damages under rule 23(b)(3).

IV.

Applying *Allison*'s predominance test, the district court determined that the requested monetary relief does not flow from liability to the class as a whole. The court stated that "many and a variety of hearings would be required to determined personalized harm to each individual plaintiff because of the mass of policies involved, differing underwriting practices among some 280 companies, differing built-in benefits, account dividends, and age at policy issuance."

A.

Plaintiffs contend they seek equitable restitution in the form of a constructive trust for class members who no longer have in-force policies. By characterizing this relief as equitable, plaintiffs hope to demonstrate that that relief is inherently compatible with rule 23(b)(2) certification, thereby avoiding *Allison*'s monetary predominance inquiry. Defendants argue that plaintiffs, who never used the term "constructive trust" in the district court, are trying to "repackage" their straightforward request for damages.

Equitable monetary relief is compatible with a rule 23(b)(2) class.[17] Importantly, this pronouncement has been limited to the context of title VII backpay, a remedy designated by statute as "equitable." 42 U.S.C. § 2000e-5(g)(1); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 n. 4, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002). Backpay is therefore unique in that it is "an integral

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[17] *See Allison*, 151 F.3d at 415-16 ("If the instant case involved only claims for equitable monetary relief, *Pettway* [*v. Am. Cast. Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir.1974)] would control. *Pettway*, however, did not address the availability in (b)(2) class actions of other forms of monetary relief, such as compensatory and punitive damages. . . ."); *Pettway*, 494 F.2d at 257 ("All that need be determined is that conduct of the party opposing the class is such as makes such equitable relief appropriate.").

component of Title VII's 'make whole' remedial scheme." *Allison*, 151 F.3d at 415; *see also Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir.1969). Not coincidentally, as compared to compensatory damages, "calculation of back pay generally involves less complicated factual determinations and fewer individual issues." *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 449 (6th Cir.2002). In *Allison*, 151 F.3d at 415, we recognized that, for this reason, backpay generally does not predominate over injunctive or declaratory relief.

It would be mistaken to presume that because backpay—a remedy readily calculable on a classwide basis—is compatible with a rule 23(b)(2) class, any other remedy designated as equitable may automatically piggyback a claim for injunctive relief. To be sure, equitable monetary remedies are less likely to predominate over a class's claim for injunctive relief, but this has more to do with the uniform character of the relief rather than with its label. Therefore, rather than decide whether plaintiffs' claim for restitution is legal or equitable in nature, we apply *Allison* and examine whether the claim predominates over the request for injunctive relief.

B.

This is not a case in which class members are entitled to a one-size-fits-all refund; assuming liability is established, individual damages will depend on the idiosyncracies of the particular dual rate or dual plan policy. For example, the age at which a class member purchased a dual rate policy will have an impact on how long the insured paid premiums and consequently on the amount of damages. Some policies contain built-in benefits covering occurrences outside of death, such as loss of limb; others pay periodic dividends. As we have observed, some defendants, beginning in 1988, voluntarily adjusted premiums and benefits for some policies sold on a race-distinct basis.

Plaintiffs propose using standardized formulas or restitution grids to calculate individual class members' damages. Defendants counter that "thousands" of grids must be constructed to account for the myriad of policy variations. That may be so, but the monetary predominance test does not contain a sweat-of-the-brow exception. Rather, we are guided by its command that damage calculation "should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations." *Allison*, 151 F.3d at 415.

In the list of policy variables cited by defendants and the district court, none requires the gathering of subjective evidence.[18] This is not, for example, like *Allison*, a title VII case in which class members' claims for compensatory and punitive damages necessarily "implicate[ ] the subjective differences of each plaintiff's circumstances." *Id.* at 417. Rather, assuming that unlawful discrimination is found, class members automatically will be entitled to the difference between what a black and a white paid for the same policy. Not coincidentally, such damages flow from liability in much the same manner that an award of backpay results from a finding of employment discrimination. *Pettway*, 494 F.2d at 256-58.

We are well aware that, as *Allison* qualifies, 151 F.3d at 415, the calculation of monetary damages should not "entail complex individualized determinations." Although it is arguable that the construction of thousands of restitution grids, though based on objective data, involves the sort of complex

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[18] Had plaintiffs not limited their proposed class to dual rate and dual plan policies, individual hearings would be necessary to determine whether pretextual underwriting practices were used to force the respective class members into substandard plans. In that instance, we agree with the district court that the large number of defendants and underwriting practices would be relevant to finding the predominance of monetary damages.

data manipulations forbidden by *Allison*, we read *Allison* to the contrary. The policy variables are identifiable on a classwide basis and, when sorted, are capable of determining damages for individual policyowners; none of these variables is unique to particular plaintiffs.[19] The prevalence of variables common to the class makes damage computation "virtually a mechanical task." *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 326-27 (5th Cir.1978) (quoting *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir.1977)).[20]

Finally, defendants' records contain the information necessary to determine disparities between, on the one hand, dual rate and dual plan policies, and on the other hand, plans

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[19] In this sense, the instant case is unlike *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 744-45 (5th Cir.2003), in which we found monetary damages predominant in a proposed rule 23(b)(3) class alleging violations of Texas's statute prohibiting the unauthorized practice of law. Non-lawyers were alleged to have used "legal skill or knowledge" in the preparation of mortgage closing documents. Whether certain practices by the non-lawyers violated the statute was determinable on a classwide basis; we explained, however, that monetary damages predominated, because the extent of these practices varied by transaction, and plaintiffs were entitled to a refund only for those practices that violated the statute. Therefore, *each* transaction had to be dissected to determine the extent of liability and damages.

[20] One is left wondering in what circumstances (if any) the dissent would permit monetary damages in a rule 23(b)(2) class. Remarkably, the dissent makes no attempt to explain its view that insurance policy factors such as premium rate, issue age, and benefits paid are based on "intangible, subjective differences." *Allison*, 151 F.3d at 415. Instead, *Allison*'s statement that damages be "capable of computation by means of objective standards" is ideal for refund-type cases such as this, in which damages are calculable using factors developed and maintained in the course of defendants' business. *Id.* The dissent evidently would limit damages in rule 23(b)(2) classes to instances in which there is no variance among the "specific characteristics of each policy and policyholder," a standard that necessarily would require that each class members' damages be identical. It is safe to say that the dissent's novel approach is unsupported by caselaw.

sold to whites. Damage calculations do not require the manipulation of data kept outside defendants' normal course of business. Defendants' complaints to the contrary are belied by the fact that, since 1988, many policies have been adjusted to account for racial disparity.

V.

As noted, defendants have not sold dual plan or dual rate policies since the 1970's; some class members purchased their policies as far back as the 1940's. The district court denied certification also on the basis that individualized hearings are necessary to determine expiration of the statute of limitations for particular sets of policies. The predominance of individual issues necessary to decide an affirmative defense may preclude class certification. *Castano*, 84 F.3d at 744. Limitations is an affirmative defense. Fed. R.Civ.P. 8(c); 2 James W. Moore et al., Moore's Federal Practice § 8.07[1], at 8-34 (3d ed.2003).

Although, under §§ 1981 and 1982, state law governs the substantive limitations period, federal law determines when the period accrues. *Perez v. Laredo Junior Coll.*, 706 F.2d 731, 733 (5th Cir.1983). It commences when the plaintiff either has actual knowledge of the violation or has knowledge of facts that, in the exercise of due diligence, would have led to actual knowledge.[21] State law may further toll the running of limitations. *Gartrell v. Gaylor*, 981 F.2d 254, 257 (5th Cir.1993).

Doubtless most class members, the majority of whom are poor and uneducated, remain unaware of defendants' discriminatory practices. Of the thirteen representative plaintiffs, defendants point to only one, Jo Ella Brown, whose

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[21] *E.g., Harris v. Hegmann*, 198 F.3d 153, 156-57 (5th Cir.1999); *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir.1988).

claim may have expired because of actual knowledge of defendants' practices.

To hold that each class member must be deposed as to precisely when, if at all, he learned of defendants' practices would be tantamount to adopting a *per se* rule that civil rights cases involving deception or concealment cannot be certified outside a two-or three-year period.[22] *Waste Mgmt. Holdings, Inc.*, 208 F.3d 288, 296 (1st Cir.2000). Such a result would foreclose use of the class action device for a broad subset of claims, a result inconsistent with the efficiency aims of rule 23. Though individual class members whose claims are shown to fall outside the relevant statute of limitations are barred from recovery, this does not establish that individual issues predominate, particularly in the face of defendants' common scheme of fraudulent concealment.

Instead, defendants rely on a theory of constructive notice, arguing that widespread media reporting of the issue over the last several decades should have "excite[d] the inquiry of a reasonable person." *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 858 F.2d 499, 504 (9th Cir.1988). Where events receive "widespread publicity, plaintiffs may be charged with knowledge of their occurrence." *United Klans of Am. v. McGovern*, 621 F.2d 152, 154 (5th Cir.1980); *In re Beef Antitrust Indus. Litig.*, 600 F.2d 1148, 1170 (5th Cir.1979). The district court believed constructive notice to be an indi-

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[22] The district court's reliance on *Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir.1998), is misplaced. The proposed class, all smokers before age nineteen, brought medical monitoring claims against defendant tobacco companies. The court, *id.* at 149, determined that individual issues existed as to the accrual of the statute of limitations, which required a determination for each plaintiff as to when "he began smoking and how much he has smoked since then." By definition, the limitations period had commenced for each and every class member. Here, accrual of the statute of limitations is premised on defendants' common practice of concealment, so a presumption of unawareness by the plaintiff class is warranted.

vidual issue, or at least a regional one, stating that "whether a plaintiff in Michigan, as compared to a plaintiff in Louisiana, had constructive notice, is a fact issue which needs to be determined individually and not on a class-wide basis."

Whether the media reports were sufficiently publicized so as to provide constructive notice is an issue reserved for the merits. Our analysis is limited to whether this issue is determinable on a classwide basis. Had defendants provided evidence—or even alleged—that media treatment of this issue was more prevalent in some regions of the country than in others, the district court's observation that individualized hearings are required to determine the geographic reach of constructive notice might be sustainable.

The requirement of "widespread publicity," *McGovern*, 621 F.2d at 154, suggests, however, that the appropriate frame of reference is the national media market, at least for issues of national importance. Several publications listed by defendants, including the *Washington Post*, the *Wall Street Journal*, and *USA Today*, are available throughout the United States, and although many other publications are local newspapers, that fact is entirely consistent with national treatment of the issue. Neither the district court nor defendants give good reason for geographically splicing constructive notice. We therefore have no difficulty concluding that whether plaintiffs were provided constructive notice is an issue that can be decided on a classwide basis.

The order denying class certification is REVERSED, and this matter is REMANDED for further proceedings consistent with this opinion. We express no view on the district court's ultimate decision whether to certify in light of today's opinion, nor do we opine on the ultimate merits of the substantive claims.

EDITH BROWN CLEMENT, *Circuit Judge*, dissenting:

It is a factual determination that relief sought relates predominantly to money damages. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir.1998). It is a legal conclusion that this factual determination should control class certification. *Id.* The former factual determination is subject to a review for abuse of discretion; the latter legal conclusion is subject to *de novo* review. *Id.* This Court reviews *de novo* whether a district court has applied the correct factual examination to certify a class under Rule 23(b)(2). *See id.* Upon concluding that the district court has applied the correct factual examination, this Court reviews the factual findings of that examination for clear error.

The majority seems to muddle these distinct standards of review. The majority engages in *de novo* factfinding as it reviews the district court's determination that the relief sought relates predominantly to money damages. The majority does so with regard to two of the district court's findings: (1) that money damages do not flow from liability to the class as a whole; and (2) that a predominant proportion of the class does not seek injunctive relief. In setting aside these factual findings, the majority fails to show that the district court has committed clear error.

The majority acknowledges that "the district court determined that the requested monetary relief does not flow from liability to the class as a whole," and further accedes that "it is arguable" that the damages calculations "involve[ ] the sort of complex data manipulations forbidden by *Allison*. . . ." Nevertheless, the majority concludes that class certification is proper merely because "variables common to the class" exist. In effect, the majority identifies a reason supporting the district court opinion—the appearance of complex damages calculations—and a reason contravening that opinion—the existence of variables common to the class. The majority then proceeds to credit the latter reason as being

more credible than the former. Yet although the majority does cite this reason for its factual determination, it fails to show that the district court's finding rises to the level of clear error. Given the fact that the damages calculations appear complex, the alleged inconsistent reason does not imply that the court abused its discretion.

The second finding of fact that the majority reviews *de novo* concerns the proportion of injunctive-relief beneficiaries. The majority concludes that the proportion of injunctive-relief beneficiaries predominates the class. This is a necessary determination to grant certification under Rule 23(b)(2). *See Bolin v. Sears, Roebuck & Co.,* 231 F.3d 970, 978 (5th Cir.2000) (denying certification because "most of the class" consists of individuals who do not face further harm, and opining that because those plaintiffs have nothing to gain from an injunction, "the definition of the class shows that most of the plaintiffs are seeking only damages"); *accord* Majority Opinion,— F.3d —, — (5th Cir.2004) ("Because only a negligible *proportion* of proposed class members were properly seeking injunctive relief, we held [in *Bolin*] that rule 23(b)(2) certification was inappropriate.") (emphasis added). As *Bolin* indicates, this factual "proportionality" determination can be dispositive.

Here, the Plaintiffs allege that the proportion of injunctive-relief beneficiaries constitutes over 80% of the class, whereas the Defendants assert that the proportion is only 18%. After conducting a hearing, the district court opined that the "true central relief sought by the plaintiffs [was] for monetary damages." 208 F.R.D. 571, 574 (E.D.La.2002). This finding implies that the district court discredited the Plaintiffs' factual assertion of 80%. Nothing in the record intimates that the court would have abused its discretion in only crediting the Defendants' estimate.

Unlike the finding of the district court, the majority credits the Plaintiffs' factual assertion. Were the majority to have

credited only the Defendants' estimate of 18%, it would not have been able to declare that "the proportion is sufficient"; it would not have been able to determine that the relief sought does not relate predominantly to money damages. To reach its ultimate finding of fact, then, the majority is forced to give credence to the Plaintiffs' assertion of injunctive-relief beneficiaries. Notably, the majority fails to provide any stated reason for crediting the Plaintiffs' assertion with as much weight as it does the Defendants'. It fails to explain how the district court abused its discretion on this issue.

Furthermore, even if it were unclear whether the district court only credited the Defendants' factual assertion, this would be no cause for the majority to give weight to the Plaintiffs' assertion. Because the underlying factual issue of proportionality is central to the ultimate question of fact, this Court should have at least remanded this case for clarification of this proportionality issue. On remand, the district court could specify whether it in fact did credit the Plaintiffs' assertion. A district court, rather than an appellate court, is the proper judicial forum to make findings of fact. The majority's crediting of the Plaintiffs' factual assertion regarding the proportion of injunctive-relief beneficiaries is unwarranted.

Under the applicable abuse-of-discretion standard, the majority's determination that the Plaintiffs' claims for money damages do not predominate is unjustified appellate factfinding. I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 02-30540

In the Matter of: MONUMENTAL LIFE INSURANCE COMPANY, INDUSTRIAL LIFE INSURANCE LITIGATION.

MATTIE BRATCHER, *et al.*,

Plaintiffs,

MATTIE BRATCHER; JOHN BRATCHER; CAROLINE BROWN, on Behalf of Herself and All Others Similarly Situated; MARY SUE TRUESDALE; MAXINE CASH, on Behalf of Herself and All Others Similarly Situated; MILDRED BUFORD, Also Known as MILDRED GAMLIN, on Behalf of Herself and All Others Similarly Situated,

Plaintiffs-Appellants,

v.

NATIONAL STANDARD LIFE INSURANCE COMPANY, *et al.*,

Defendants,

MONUMENTAL LIFE INSURANCE COMPANY,

Defendant-Appellee.

In the Matter of: UNITRIN, INC., INDUSTRIAL LIFE INSURANCE LITIGATION.

ROSIE LEE COTHRAN, *et al.*,

Plaintiffs,

ELIZABETH WALKER,

Plaintiff-Appellee,

v.

SECURITY INDUSTRIAL INSURANCE COMPANY, *et al.*,
Defendants,

MONUMENTAL LIFE INSURANCE COMPANY,
Defendant-Appellee.

In the Matter of: AMERICAN NATIONAL INSURANCE COMPANY, INDUSTRIAL LIFE INSURANCE LITIGATION.

ROSE MARY ROACH, on Behalf of Herself and All Others Similarly Situated,
Plaintiff-Appellant,

v.

AMERICAN NATIONAL INSURANCE COMPANY,
Defendant-Appellee.

In the Matter of: WESTERN & SOUTHERN LIFE INSURANCE CO., INDUSTRIAL LIFE INSURANCE LITIGATION.

JOSEPH BELL, ETC., *et al.*,
Plaintiffs,

JOSEPH BELL, Individually and on Behalf of Others Similarly Situated; WILLA ELLIS, DOCTOR; THELMA WALKER OATIS, on Behalf of Themselves and All Others Similarly Situated; ALMA HYDE,
Plaintiffs-Appellants,

v.

WESTERN & SOUTHERN LIFE INSURANCE COMPANY,
Defendant-Appellee.

Aug. 13, 2003.

Before SMITH, DENNIS and CLEMENT, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

In what may be the ultimate negative value class action lawsuit,[1] plaintiffs challenge defendants' alleged practice of paying lower benefits and charging higher premiums to blacks in the sale of low-value life insurance. The district court denied plaintiffs' motion to certify a class pursuant to FED.R.CIV.P. 23(b)(2), finding, *inter alia*, that the majority of class members would not benefit from injunctive relief. Based primarily on *Allison v. Citgo Petroleum Co.*, 151 F.3d 402 (5th Cir.1998), we reverse and remand.

I.

This is a consolidation of civil rights actions against three life insurance companies: Monumental Life Insurance Company ("Monumental"), American National Insurance Company ("ANICO"), and Western and Southern Insurance Company ("Western and Southern"). Plaintiff policyowners, all of whom are black, allege that, for decades, defendants discriminated against them in the sale and administration of low-value life insurance policies, known as industrial life policies,[2] that have face amounts of $2000 or less and require small weekly or monthly premiums. Defendants comprise over 280 companies that issued industrial life policies over a fifty- to sixty-five-year period.[3]

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[1] A "negative value" suit is one in which class members' claims "would be uneconomical to litigate individually." *Phillips Petroleum v. Shutts*, 472 U.S. 797, 809, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir.1996).

[2] Defendants defend this practice on the basis that (1) the race-distinct pricing was justified; (2) the practice was approved by regulators; (3) the racially discriminatory policies were no more profitable than were those sold to whites; and (4) some of the discriminatory policies were remediated.

[3] Over the years, defendants have acquired other insurance companies and thereby assumed blocks of in-force insurance policies issued by them.

Plaintiffs allege two overtly discriminatory practices. First, they accuse defendants of placing blacks in industrial policies offering the same benefits as do policies sold to whites, but at a higher premium (dual rates). Second, defendants allegedly placed blacks in specially-designed substandard industrial policies providing fewer or lower benefits than do comparable plans sold to whites (dual plans). These practices are memorialized in the insurer's rate books and records, which explicitly distinguish dual rate and dual plan policies by race.[4] Although, before filing their motion for class certification, plaintiffs challenged the insurers' alleged practice of charging blacks substandard premiums because of non-racial underwriting factors, such as mental condition, occupation, socio-economic status, educational level, living conditions, and personal habits, plaintiffs no longer complain of such pretextual underwriting procedures.

Defendants state that they issued "hundreds, perhaps thousands, of different industrial life insurance products" encompassing a countless variety of underwriting standards. It is undisputed that all companies that sold dual rate or dual plan policies have not done so since the early 1970's. Also, as early as 1988, some insurers voluntarily adjusted premiums and/or death benefits to equalize the amount of coverage per premium dollar. Still, plaintiffs estimate that over 4.5 million of the 5.6 million industrial policies issued by defendants remain in-force; many other policies have been

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Monumental currently administers policies issued by 200 different companies, while Western and Southern administers policies issued by approximately 80 companies. ANICO has assumed an indeterminate number of in-force policies.

[4] As an example, a 1962 ANICO rate book shows that, for a twenty-year-old black, a $500 "20 Pay Life" industrial policy charged a weekly premium of $0.41, while a twenty-year-old white paid only $0.32.

terminated, surrendered, or paid-up without remediation.[5] Defendants' expert estimates that the ratio of terminated policies to outstanding policies is approximately five to one, meaning that slightly more than one million policies remain in-force.

Plaintiffs sued for violations of 42 U.S.C. §§ 1981 and 1982, seeking (1) an injunction prohibiting the collection of discriminatory premiums, (2) reformation of policies to equalize benefits, and (3) restitution of past premium overcharges or benefit underpayments. Pursuant to 28 U.S.C. § 1407, the Judicial Panel for Multidistrict Litigation ("MDL") consolidated the actions against Monumental and transferred them to the Eastern District of Louisiana for pretrial proceedings. Later, the MDL Panel took the same action with the cases against ANICO and Western and Southern.

Plaintiffs moved for certification of a class pursuant to rule 23(b)(2), requesting that class members be provided notice and opt-out rights. The district court denied certification, finding that plaintiffs' claims for monetary relief predominate over their claims for injunctive relief, making rule 23(b)(2) certification inappropriate. The court also found that, given the large number of companies and policies involved, individualized hearings were necessary to determine damages and whether claims were barred by the statute of limitations. Defendants sought, and this court granted, interlocutory review pursuant to FED.R.CIV.P. 23(f).

II.

Defendants contend that class members cannot be readily identified by way of the class definition. A precise class definition is necessary to identify properly "those entitled to

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[5] Plaintiffs allege that Monumental has not adjusted any of its dual rate or dual plan policies. ANICO adjusted one of its four discriminatory "Standard No. 3 plans".

relief, those bound by the judgment, and those entitled to notice." 5 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.21[6], at 23-62.2 (3d ed.2003); *see DeBremaecker v. Short,* 433 F.2d 733, 734 (5th Cir.1970). Some courts have stated that a precise class definition is not as critical where certification of a class for injunctive or declaratory relief is sought under rule 23(b)(2).[6] Where notice and opt-out rights are requested, however, a precise class definition becomes just as important as in the rule 23(b)(3) context.

Plaintiffs sought to certify a class comprised of "[a]ll African-Americans who own, or owned at the time of policy termination, an industrial life insurance policy that was issued as a substandard plan or at a substandard rate." Defendants argue that the plain language of that definition does not comport with the class plaintiffs seek to certify. As we have noted, before moving for certification plaintiffs had included not only blacks who had purchased dual rate or dual plan policies, but also blacks who allegedly were forced into substandard plans, or forced to pay substandard rates, through the use of non-racial underwriting factors.

In their motion for certification, plaintiffs narrowed the class, stating that "[t]he proposed class *does not* include those who may have been subjected to covert socio-economic forms of racial discrimination." Plaintiffs specified that "the term 'substandard' applies to overt race-distinct dual pre-

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[6] *See Battle v. Commonwealth*, 629 F.2d 269, 271 n. 1 (3d Cir.1980) ("Where . . . the class action seeks only injunctive or declaratory relief, for which the notice provision of Fed.R.Civ.P. 23(c)(2) is not mandatory, the district court has even greater freedom in both the timing and specificity of its class definition."); *Rice v. City of Philadelphia*, 66 F.R.D. 17, 19 (E.D.Pa.1974) ("[T]he precise definition of the [(b)(2)] class is relatively unimportant. If relief is granted to the plaintiff class, the defendants are legally obligated to comply, and it is usually unnecessary to define with precision the persons entitled to enforce compliance. . . .").

miums and plans, not to policies called substandard because of other factors such as socio-economic underwriting." We agree with defendants' observation that, as written, the class definition includes all blacks who paid substandard rates or were issued substandard plans. The definition makes no distinction between class members who purchased dual rate or dual plan policies and those forced into substandard rates or substandard plans through the use of pretextual underwriting practices. In other words, one must look to the certification motion for an adequate description of the proposed class.

Holding plaintiffs to the plain language of the class definition would be overly formalistic. In the first place, the district court, in denying certification, apparently did not consider the pretextual claims as part of the proposed class. Though referring to the "mass of policies involved" and the "differing underwriting practices among some 280 companies," the court stated that in calculating damages, individualized hearings were necessary to account for the idiosyncracies of each policy. At no point did the court suggest that individualized hearings were necessary to determine liability, as would be necessary if pretextual underwriting claims were part of the class.

Second, holding plaintiffs to the plain language of their definition would ignore the ongoing refinement and give-and-take inherent in class action litigation, particularly in the formation of a workable class definition. District courts are permitted to limit or modify class definitions to provide the necessary precision.[7] If the class is certified on remand, we

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[7] *See, e.g., Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir.1993) ("A court is not bound by the class definition proposed in the complaint and should not dismiss the action simply because the complaint seeks to define the class too broadly."); *Harris v. Gen. Dev. Corp.*, 127 F.R.D. 655, 659 (N.D.Ill.1989) ("[I]t is certainly within this court's discretion to limit or redefine the scope of the class."); *Meyer v. Citizens & S. Nat'l*

trust that the plaintiffs or district court will amend the definition accordingly.

Defendants also argue that the definition terms "own, or owned," "industrial life insurance policy," "substandard plan," and "substandard rate" are ambiguous, further complicating identification of class members. This argument, too, is overly formalistic. *See Forbush*, 994 F.2d at 1105-06.

Plaintiffs' filings in the district court clarified any ambiguities by stating that "the class is limited to industrial policies sold at a substandard (i.e., higher) rate for African-Americans and a lower rate for Caucasians, or as a substandard plan (i.e., a more costly plan) for African-Americans and a corresponding less expensive plan for Caucasians." Plaintiffs define industrial life insurance policies as "(1) policies labeled as 'industrial' or (2) those policies with a face amount of less than $2,000.00 and weekly or monthly home premium collection." Defendants were provided adequate notice and discovery by which to argue that the narrowed class cannot be certified pursuant to rule 23(b)(2).

III.

We review for abuse of discretion the denial of class certification. *Jenkins v. Raymark Indus.*, 782 F.2d 468, 471-72 (5th Cir.1986). "Implicit in this deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation." *Allison*, 151 F.3d at 408. We review *de novo* however, the question whether the district court applied the correct legal standard. Forbush, 994 F.2d at 1104.

Bank, 106 F.R.D. 356, 360 (M.D.Ga.1985) ("The Court has discretion in ruling on a motion to certify a class. This discretion extends to defining the scope of the class.") (citations omitted).

All classes must satisfy the four baseline requirements of rule 23(a): numerosity, commonality, typicality, and adequacy of representation.[8]. FED.R.CIV.P. 23(a). Assuming these requirements are satisfied, a rule 23(b)(2) class may be certified if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED.R.CIV.P. 23(b)(2). Plaintiffs premise rule 23(b)(2) certification on their request for an injunction prohibiting the further collection of discriminatory premiums.

A.

The court observed that "many" proposed class members—those whose policies have lapsed, those whose policies have already been voluntarily adjusted by defendants, and those whose death benefits already have been paid—would not benefit from injunctive relief. The court concluded that "this is a case in which individuality overrides any bland group-think, and money becomes the prime goal . . . not injunctive relief." Rule 23(b)(2) certification is improper, the court held, where the class's request for injunctive relief merely serves as a bootstrap for a claim of monetary damages.

In *Allison*, we carefully explained the statement in the advisory committee notes that rule 23(b)(2) certification "does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to money damages." FED.R.CIV.P. 23 advisory committee notes (emphasis added).[9] *Allison* did not hold, as the district court believed,

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[8] The district court noted that "oral argument unveiled serious adequacy of representation issues," but did not rely on this basis in denying certification.

[9] *Allison*, 151 F.3d at 411-12 ("The Advisory Committee Notes make no effort to define or explain the concept. Interpreting the term literally, predominant means 'controlling, dominating, [or] prevailing.' But how

that monetary relief predominates where it is the "prime goal" or a mere bootstrap to injunctive relief. Instead, "determining whether one form of relief actually predominates in some quantifiable sense is a wasteful and impossible task that should be avoided." *Allison,* 151 F.3d at 412 (citing 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1775, at 470 (2d ed.1986)). In other words, certification does not hinge on the subjective intentions of the class representatives and their counsel in bringing suit.[10]

Instead, *Allison* looked to the nature of the rule 23(b)(2) device in defining when monetary relief predominates. That rule's focus on injunctive and declaratory relief presumes a class best described as a "homogenous and cohesive group with few conflicting interests among its members." *Id.* at 413. Class certification centers on the defendants' alleged unlawful conduct, not on individual injury. Once monetary damages enter the picture, however, class cohesiveness is generally lost, because "[m]onetary remedies are more often related directly to the disparate merits of individual claims." *Id.* (citations omitted). Where the need to address the merits of individual claims requires separate hearings, the efficiency gained by class litigation is lost.

In *Allison*, therefore, we held, *id.* at 415, that monetary relief, to be viable in a rule 23(b)(2) class, must "flow directly from liability to the class *as a whole* on the claims forming

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that translates into a workable formula for comparing different types of remedies is not at all clear.") (citation omitted).

[10] *But see Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir.2003) (expressly rejecting *Allison* and instead "focus[ing] on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit"); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 163-64 (2d Cir.2001) (stating that rule 23(b)(2) certification is appropriate only where "reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought" and "the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits").

the basis of the injunctive or declaratory relief." Monetary relief must be incidental, meaning that it is "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances."[11] *Id.* Additional hearings to resolve "the disparate merits of each individual's case" should be unnecessary. *Id.*

Of course, rule 23(b)(2) certification requires the defendants' conduct to be ongoing such that injunctive relief will benefit at least some class members. In *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 972 (5th Cir.2000), we purported to apply *Allison* to a proposed rule 23(b)(2) class of one million consumers who alleged that the defendant had employed various illegal practices to coerce payment of otherwise-discharged pre-bankruptcy debt. We observed that "[m]ost of the class consists of individuals who do not face further harm from Sear's [*sic*] actions." *Id.* at 978. In fact, *only one* class member who might benefit from injunctive relief was identified. *Id.*[12]

Here, by contrast, even defendants' expert estimates that one million dual rate or dual plan policies remain in-force.[13] The exact number of class members continuing to pay discriminatory premiums is unknown, but we are willing to assume—without contrary evidence from defendants—that the number exceeds the *de minimis* standard set by *Bolin.*

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[11] The predomination requirement serves two basic purposes, namely the interests of class members who may wish to pursue monetary claims individually, and interests of judicial economy. *Allison*, 151 F.3d at 415.

[12] When the class action was filed, the defendant was suing one of the class members in state court. Although defendant abandoned the suit, the court raised the possibility that the controversy had not been mooted. *Bolin*, 231 F.3d at 978 n. 46.

[13] As noted, plaintiffs' expert contends that 4.5 million of the 5.6 million industrial life insurance policies issued by defendants remain in-force.

B.

To the extent that *Bolin* misinterprets *Allison*by [sic] conditioning certification on the number of class members that will "truly benefit" from injunctive relief, it reflects a concern that plaintiffs may attempt to "shoehorn damages actions into the Rule 23(b)(2) framework, depriving class members of notice and opt-out protections."[14] Indeed, we suggested in *Allison*, 151 F.3d at 413, that monetary relief may predominate "when its presence in the litigation suggests that the procedural safeguards of notice and opt-out are necessary." Defendants seize on this point, arguing that plaintiffs' request for notice and opt-out is a tacit admission that rule 23(b)(2) certification is inappropriate. This ignores the discretion given a district court to order notice and opt-out rights when certifying a rule 23(b)(2) class. *See* FED.R.CIV.P. 23(d)(2).

As "fundamental requisites of the constitutional guarantees of procedural due process," *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), notice and opt-out are mandatory for damage classes certified under rule 23(b)(3). Though rule 23 does not explicitly extend these safeguards to rule 23(b)(2) classes, due process requires the provision of notice where a rule 23(b)(2) class seeks monetary damages.[15]

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[14] *Bolin*, 231 F.3d at 976; *see also McManus v. Fleetwood Enters.*, 320 F.3d 545, 554 (5th Cir.2003) ("[C]lass members would potentially receive a poor substitute for individualized money damages, without the corresponding notice and opt-out benefits of Rule 23(b)(3). . . .").

[15] *Allison*, 151 F.3d at 412 n. 4 (citing *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 436-38 (5th Cir.1979)); *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. Unit B Jan.1981). The type of notice afforded to rule 23(b)(2) class members seeking monetary relief will not always be "equivalent to that required in (b)(3) actions." *Johnson*, 598 F.2d at 438.

On the other hand, there is no absolute right of opt-out in a rule 23(b)(2) class, "even where monetary relief is sought and made available." *Penson*, 634 F.2d at 994; *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 505-07 (5th Cir. Jan.1981). Under our precedent, should the class be certified on remand, class members must be provided adequate notice, and the district court should consider the possibility of opt-out rights.[16]

Allison's statement that monetary relief may predominate where notice and opt-out are necessary reflects only the inescapable fact that such safeguards are most appropriate where individual issues diminish class cohesiveness. Then, conflicts among class members and issues of adequate representation are most likely to surface. Rule 23(b)(3) is the default vehicle for certification, but only because notice and opt-out rights are mandatory components. A district court is empowered by rule 23(d)(2) to provide notice and opt-out for any class action, so rule 23(b)(2) certification should not be denied on the mistaken assumption that a rule 23(b)(3) class is the only means by which to protect class members.[17]

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[16] *See Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) (contemplating the use of opt-out rights for a rule 23(b)(2) class); *Eubanks v. Billington*, 110 F.3d 87, 94 (D.C.Cir.1997) (holding that the language of rule 23 is sufficiently flexible to afford district courts the discretion to grant opt-out rights for rule 23(b)(2) classes).

[17] One of the dissent's two reasons for finding class certification inappropriate concerns our supposed "suggestion" that notice and opt-out rights are necessary. In *Allison*, 151 F.3d at 414, however, we explained that "[t]he fact that the predomination requirement serves to protect the rights of class members . . . does not imply . . . that the availability of monetary relief in a(b)(2) [sic] class action depends solely or directly on whether class members are entitled to notice or opt-out rights." As mentioned, this court's precedent requires that notice be provided where a rule 23(b)(2) class seeks damages, *see supra* note 15, so it is circular for the dissent to argue notice as a basis for denying certification. Our direction to the district court to consider the possibility of opt-out rights speaks nothing as to whether such rights are necessary or even desirable.

All of this further demonstrates the futility of the district court's and dissent's inquiry as to whether the "prime goal" of the class is injunctive or monetary relief. The rule 23(b)(2) predominance requirement, by focusing on uniform relief flowing from defendants' liability, "serves essentially the same functions as the procedural safeguards and efficiency and manageability standards mandated in (b)(3) class actions." *Allison*, 151 F.3d at 414-15. Therefore, to deny certification on the basis that the damage claims would be better brought as a rule 23(b)(3) class serves no function other than to elevate form over substance.[18] Indeed, interests of judicial economy are best served by resolving plaintiffs' claims for injunctive and monetary relief together.

IV.

Applying *Allison*'s predominance test, the district court determined that the requested monetary relief does not flow from liability to the class as a whole. The court stated that "many and a variety of hearings would be required to determined [sic] personalized harm to each individual plaintiff because of the mass of policies involved, differing underwriting practices among some 280 companies, differing built-in benefits, account dividends, and age at policy issuance."

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[18] Our view that the rule 23(b)(2) and (b)(3) devices may work in tandem is strengthened by the roots of subdivision (b)(2), which was added "to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil rights area." 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1775, at 470 (2d ed.1986). Before its adoption, the rules made no explicit reference to class actions involving injunctive or declaratory relief, and "there was some uncertainty whether a class action seeking one of those remedies was an appropriate device for vindicating civil rights." *Id.* at 470-71. Rule 23(b)(2) was adopted to facilitate the use of injunctive relief, not to compartmentalize claims for damages under rule 23(b)(3).

A.

Plaintiffs contend they seek equitable restitution in the form of a constructive trust for class members who no longer have in-force policies. By characterizing this relief as equitable, plaintiffs hope to demonstrate that that that [sic] relief is inherently compatible with rule 23(b)(2) certification, thereby avoiding *Allison*'s monetary predominance inquiry. Defendants argue that plaintiffs, who never used the term "constructive trust" in the district court, are trying to "re-package" their straightforward request for damages.

Equitable monetary relief is compatible with a rule 23(b)(2) class.[19] Importantly, this pronouncement has been limited to the context of title VII backpay, a remedy designated by statute as "equitable." 42 U.S.C. § 2000e-5(g)(1); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 n. 4, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002). Backpay is therefore unique in that it is "an integral component of Title VII's 'make whole' remedial scheme." *Allison*, 151 F.3d at 415; *see also Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir.1969). Not coincidentally, as compared to compensatory damages, "calculation of back pay generally involves less complicated factual determinations and fewer individual issues." *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 449 (6th Cir.2002). In *Allison,* 151 F.3d at 415, we recognized that, for this reason, backpay generally does not predominate over injunctive or declaratory relief.

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[19] *See Allison*, 151 F.3d at 415-16 ("If the instant case involved only claims for equitable monetary relief, *Pettway* [*v. Am. Cast. Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir.1974)] would control. *Pettway,* however, did not address the availability in (b)(2) class actions of other forms of monetary relief, such as compensatory and punitive damages. . . ."); *Pettway*, 494 F.2d at 257 ("All that need be determined is that conduct of the party opposing the class is such as makes such equitable relief appropriate.").

It would be mistaken to presume that because backpay—a remedy readily calculable on a classwide basis—is compatible with a rule 23(b)(2) class, any other remedy designated as equitable may automatically piggyback a claim for injunctive relief. To be sure, equitable monetary remedies are less likely to predominate over a class's claim for injunctive relief, but this has more to do with the uniform character of the relief rather than with its label. Therefore, rather than decide whether plaintiffs' claim for restitution is legal or equitable in nature, we apply *Allison* and examine whether the claim predominates over the request for injunctive relief.

B.

This is not a case in which class members are entitled to a one-size-fits-all refund; assuming liability is established, individual damages will depend on the idiosyncracies of the particular dual rate or dual plan policy. For example, the age at which a class member purchased a dual rate policy will have an impact on how long the insured paid premiums and consequently on the amount of damages. Some policies contain built-in benefits covering occurrences outside of death, such as loss of limb; others pay periodic dividends. As we have observed, some defendants, beginning in 1988, voluntarily adjusted premiums and benefits for some policies sold on a race-distinct basis.

Plaintiffs propose using standardized formulas or restitution grids to calculate individual class members' damages. Defendants counter that "thousands" of grids must be constructed to account for the myriad of policy variations. That may be so, but the monetary predominance test does not contain a sweat-of-the-brow exception. Rather, we are guided by its command that damage calculation "should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations." *Allison*, 151 F.3d at 415.

In the list of policy variables cited by defendants and the district court, none requires the gathering of subjective evidence.[20] This is not, for example, like *Allison*, a title VII case in which class members' claims for compensatory and punitive damages necessarily "implicate[ ] the subjective differences of each plaintiff's circumstances." *Id.* at 417. Rather, assuming that unlawful discrimination is found, class members automatically will be entitled to the difference between what a black and a white paid for the same policy. Not coincidentally, such damages flow from liability in much the same manner that an award of backpay results from a finding of employment discrimination. *Pettway*, 494 F.2d at 256-58.

We are well aware that, as *Allison* qualifies, 151 F.3d at 415, the calculation of monetary damages should not "entail complex individualized determinations." Although it is arguable that the construction of thousands of restitution grids, though based on objective data, involves the sort of complex data manipulations forbidden by *Allison*, we read *Allison* to the contrary. The policy variables are identifiable on a classwide basis and, when sorted, are capable of determining damages for individual policyowners; none of these variables is unique to particular plaintiffs.[21] The

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[20] Had plaintiffs not limited their proposed class to dual rate and dual plan policies, individual hearings would be necessary to determine whether pretextual underwriting practices were used to force the respective class members into substandard plans. In that instance, we agree with the district court that the large number of defendants and underwriting practices would be relevant to finding the predominance of monetary damages.

[21] In this sense, the instant case is unlike *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 744-45 (5th Cir.2003), in which we found monetary damages predominant in a proposed rule 23(b)(3) class alleging violations of Texas's statute prohibiting the unauthorized practice of law. Non-lawyers were alleged to have used "legal skill or knowledge" in the preparation of mortgage closing documents. Whether certain prac-

prevalence of variables common to the class makes damage computation "virtually a mechanical task." *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 326-27 (5th Cir.1978) (quoting *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir.1977)).[22]

Finally, defendants' records contain the information necessary to determine disparities between, on the one hand, dual rate and dual plan policies, and on the other hand, plans sold to whites. Damage calculations do not require the manipulation of data kept outside defendants' normal course of business. Defendants' complaints to the contrary are belied by the fact that, since 1988, many policies have been adjusted to account for racial disparity.

V.

As noted, defendants have not sold dual plan or dual rate policies since the 1970's; some class members purchased

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tices by the non-lawyers violated the statute was determinable on a classwide basis; we explained, however, that monetary damages predominated, because the extent of these practices varied by transaction, and plaintiffs were entitled to a refund only for those practices that violated the statute. Therefore, *each* transaction had to be dissected to determine the extent of liability and damages.

[22] One is left wondering in what circumstances (if any) the dissent would permit monetary damages in a rule 23(b)(2) class. Remarkably, the dissent makes no attempt to explain its view that insurance policy factors such as premium rate, issue age, and benefits paid are based on "intangible, subjective differences." *Allison*, 151 F.3d at 415. Instead, *Allison*'s statement that damages be "capable of computation by means of objective standards" is ideal for refund-type cases such as this, in which damages are calculable using factors developed and maintained in the course of defendants' business. *Id.* The dissent evidently would limit damages in rule 23(b)(2) classes to instances in which there is no variance among the "specific characteristics of each policy and policyholder," a standard that necessarily would require that each class members' damages be identical. It is safe to say that the dissent's novel approach is unsupported by caselaw.

their policies as far back as the 1940's. The district court denied certification also on the basis that individualized hearings are necessary to determine expiration of the statute of limitations for particular sets of policies. The predominance of individual issues necessary to decide an affirmative defense may preclude class certification. *Castano*, 84 F.3d at 744. Limitations is an affirmative defense. FED.R.CIV.P. 8(c); 2 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 8.07[1], at 8-34 (3d ed.2003).

Although, under §§ 1981 and 1982, state law governs the substantive limitations period, federal law determines when the period accrues. *Perez v. Laredo Junior Coll.*, 706 F.2d 731, 733 (5th Cir.1983). It commences when the plaintiff either has actual knowledge of the violation or has knowledge of facts that, in the exercise of due diligence, would have led to actual knowledge.[23] State law may further toll the running of limitations. *Gartrell v. Gaylor*, 981 F.2d 254, 257 (5th Cir.1993).

Doubtless most class members, the majority of whom are poor and uneducated, remain unaware of defendants' discriminatory practices. Of the thirteen representative plaintiffs, defendants point to only one, Jo Ella Brown, whose claim may have expired because of actual knowledge of defendants' practices.

To hold that each class member must be deposed as to precisely when, if at all, he learned of defendants' practices would be tantamount to adopting a *per se* rule that civil rights cases involving deception or concealment cannot be certified outside a two-or three-year period.[24] *Waste Mgmt. Holdings,*

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[23] *E.g., Harris v. Hegmann*, 198 F.3d 153, 156-57 (5th Cir.1999); *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir.1988).

[24] The district court's reliance on *Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir.1998), is misplaced. The proposed class, all smokers before age nineteen, brought medical monitoring claims against defendant

Inc., 208 F.3d 288, 296 (1st Cir.2000). Such a result would foreclose use of the class action device for a broad subset of claims, a result inconsistent with the efficiency aims of rule 23. Though individual class members whose claims are shown to fall outside the relevant statute of limitations are barred from recovery, a rebuttable presumption that the class lacks knowledge of defendants' concealment is warranted at the class certification stage.

Instead, defendants rely on a theory of constructive notice, arguing that widespread media reporting of the issue over the last several decades should have "excite[d] the inquiry of a reasonable person." *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 858 F.2d 499, 504 (9th Cir.1998). Where events receive "widespread publicity, plaintiffs may be charged with knowledge of their occurrence." *United Klans of Am. v. McGovern*, 621 F.2d 152, 154 (5th Cir.1980); *In re Beef Antitrust Indus. Litig.*, 600 F.2d 1148, 1170 (5th Cir.1979). The district court believed constructive notice to be an individual issue, or at least a regional one, stating that "whether a plaintiff in Michigan, as compared to a plaintiff in Louisiana, had constructive notice, is a fact issue which needs to be determined individually and not on a class-wide basis."

Whether the media reports were sufficiently publicized so as to provide constructive notice is an issue reserved for the merits. Our analysis is limited to whether this issue is determinable on a classwide basis. Had defendants provided evidence—or even alleged—that media treatment of this issue

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tobacco companies. The court, *id.* at 149, determined that individual issues existed as to the accrual of the statute of limitations, which required a determination for each plaintiff as to when "he began smoking and how much he has smoked since then." By definition, the limitations period had commenced for each and every class member. Here, accrual of the statute of limitations is premised on defendants' common practice of concealment, so a presumption of unawareness by the plaintiff class is warranted.

was more prevalent in some regions of the country than in others, the district court's observation that individualized hearings are required to determine the geographic reach of constructive notice might be sustainable.

The requirement of "widespread publicity," *McGovern*, 621 F.2d at 154, suggests, however, that the appropriate frame of reference is the national media market, at least for issues of national importance. Several publications listed by defendants, including the *Washington Post*, the *Wall Street Journal*, and *USA Today*, are available throughout the United States, and although many other publications are local newspapers, that fact is entirely consistent with national treatment of the issue. Neither the district court nor defendants give good reason for geographically splicing constructive notice. We therefore have no difficulty concluding that whether plaintiffs were provided constructive notice is an issue that can be decided on a classwide basis.

The order denying class certification is REVERSED, and this matter is REMANDED for further proceedings consistent with this opinion. We express no view on the district court's ultimate decision whether to certify in light of today's opinion, nor do we opine on the ultimate merits of the substantive claims.

CLEMENT, *Circuit Judge*, dissenting:

Based on *Allison v. Citgo Petroleum Co.*, 151 F.3d 402 (5th Cir.1998), and *McManus v. Fleetwood Enters.*, 320 F.3d 545 (5th Cir.2003), the district court properly denied class certification to Plaintiffs.

Plaintiffs seek class certification under Rule 23(b)(2), which permits cases meeting the requirements of Rule 23(a) to be certified as class actions if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED.R.CIV.P. 23(b)(2). Unlike Rule 23(b)(1) or (b)(3), Rule 23(b)(2) "was intended to focus on cases where broad, class-wide injunctive or declaratory relief is necessary." *Allison*, 151 F.3d at 412.

Rule 23(b)(2) is silent as to whether monetary remedies may be sought in conjunction with injunctive or declaratory relief, but the Advisory Committee Notes on Rule 23 state that class certification under (b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." *Id.* at 411. Based on this language, the Fifth Circuit "neither allow[s] certification without regard to the monetary remedies being sought, nor restrict[s] certification to classes seeking exclusively injunctive or declaratory relief." *Id.* The key question is whether "the predominant relief sought is injunctive or declaratory." *Id.* at 411-412; *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 15 (2d Cir.2003). The corresponding question is whether the monetary relief is incidental to the requested injunctive or declaratory relief.[1] *Allison*, 151 F.3d at 415. If injunctive or declaratory relief does not pre-

[1] Incidental damages are defined as those "that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Id.*

dominate (or if monetary relief is not incidental), class certification under Rule 23(b)(2) is inappropriate.[2] *Id.*

There are two circumstances in which Rule 23(b)(2) class certification is inappropriate. First, Rule 23(b)(2) does not provide for procedural safeguards like notice and opt-out rights, primarily because the class is presumed to be "homogenous and cohesive" due to "the *group* nature of the harm alleged and the *broad* character of the relief sought." *Id.* at 413 (emphasis added). Therefore, if notice and/or opt-out rights seem to be necessary, then certification under Rule 23(b)(2) may be inappropriate. *Id.* ("[M]onetary relief 'predominates' under Rule 23(b)(2) when its presence in the litigation suggests that the procedural safeguards of notice and opt-out are necessary.").

Second, Rule 23(b)(2) only permits monetary relief in the form of "uniform group remedies." *Id.* at 414; *McManus,* 320 F.3d at 554. Uniform group remedies are consistent with Rule 23(b)(2) for two reasons: (1) they are "capable of computation by means of objective standards," thus avoiding the need for "complex individualized determinations" and procedural safeguards like notice and opt-out rights; and (2) the group nature of the remedy ensures that the class remains "homogenous and cohesive."[3] *Allison*, 151 F.3d at 413, 415

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[2] Equitable monetary relief, such as back pay, is not subject to the *Allison* predomination test. *Allison*, 151 F.3d at 415-16 ("If the instant case involved only claims for equitable monetary relief, [*Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir.1974)] would control. *Pettway*, however, did not address the availability in (b)(2) class actions of other forms of monetary relief, such as compensatory and punitive damages, nor did it have any occasion to do so.").

[3] Footnote 22 of the majority opinion misrepresents the meaning of the term "uniform group remedies". In a Rule 23(b)(2) class action, each class member does not need to receive the exact same amount of monetary relief. *Allison*, 151 F.3d at 415. However, the monetary relief awarded must be based on the "group nature of the harm alleged" rather than the individual harm suffered by each class member. *Id.* at 413, 415.

(noting that "as claims for individually based money damages begin to predominate, the presumption of cohesiveness decreases"). Therefore, Rule 23(b)(2) class certification is inappropriate where the monetary relief requires "a specific or time-consuming inquiry into the varying circumstances and merits of each class member's individual case." *Id.*

Under the test articulated in *Allison*, it is clear that Rule 23(b)(2) class certification is inappropriate in this case. First, the majority opinion suggests that notice and opt-out rights are necessary: "Under our precedent, should the class be certified on remand, class members must be provided adequate notice, and the district court should consider the possibility of opt- out rights."

Second, a uniform group remedy is not possible in this case because Plaintiffs seek individualized remedies based on the specific characteristics of each policy and policyholder.[4] Plaintiffs concede that the "amount of the awards vary" based on "factors including the premium rates charged to African-Americans and Caucasians, the issue ages for each policy, and the benefits provided." Monetary relief in a Rule 23(b)(2) class action should not be "dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Allison*, 151 F.3d at 415; *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 975 n. 22 (5th Cir.2000) (stating that Rule 23(b)(2) was created to address "group, as opposed to individual[,] injuries"). Therefore, Rule 23(b)(2) class certification is inappropriate here.

Review of the record provides further evidence that Rule 23(b)(2) class certification is inappropriate. Plaintiffs seek: (1) an injunction prohibiting the collection of discriminatory premiums; (2) reformation of existing policies to equalize

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[4] Part IIIB of the majority opinion concedes that the individual issues in this case have diminished the cohesiveness of the class to the point where notice and opt-out rights are necessary.

benefits; and (3) restitution of past premium overcharges or benefit overpayments. The parties appear to agree that: (1) the basis of Plaintiffs' suit is the issuance of hundreds of different industrial life insurance policies by several hundred Defendants over a period of 50 to 65 years; (2) Defendants ceased issuing such policies in the mid-1970s (or, at the latest, the early 1980s); (3) many, if not most, of the industrial life insurance policies are no longer in effect; and (4) a large number of the remaining policies have been modified to some extent by Plaintiffs or Defendants. In this light, the first and second remedies sought by Plaintiffs would seem to be of little consequence to many, if not most, Plaintiffs because the injunction and reformation would only affect those Plaintiffs who still hold industrial life insurance policies that have remained largely unaltered for over 20 years (and up to 75 years). For Plaintiffs who do not fit into this category, the only relief would be monetary in nature: the restitution of past premium overcharges or benefit overpayments.

In sum, the factual basis of Plaintiffs' suit indicates that injunctive or declaratory relief does not predominate and that the monetary relief is not incidental. *McManus*, 320 F.3d at 553-54 (concluding that the factual basis of plaintiffs' suit was "markedly different from the paradigm Rule 23(b)(2) class action," and thus class certification under Rule 23(b)(2) was inappropriate); *James v. City of Dallas*, 254 F.3d 551, 572 (5th Cir.2001) (analyzing the factual basis of plaintiffs' suit and concluding that class certification was appropriate). As this Court stated in *McManus*, permitting this case to be certified under Rule 23(b)(2)

> would undo the careful interplay between Rules 23(b)(2) and (b)(3) [because] the class members would potentially receive a poor substitute for individualized money damages, without the corresponding notice and opt-out benefits of Rule 23(b)(3)[,] and defendants would potentially be forced to pay what is effectively money

> damages, without the benefit of requiring plaintiffs to meet the rigorous Rule 23(b)(3) requirements.

320 F.3d at 554. This Court should not allow plaintiffs "to shoehorn damages actions into the Rule 23(b)(2) framework" and thus blur the distinctions between the different types of class actions.[5] *Bolin*, 231 F.3d at 976. Therefore, I respectfully dissent.

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[5] Part IIIB of the majority opinion indicates that: (1) it is "futile" to inquire whether injunctive/declaratory or monetary relief predominates in a class action, and (2) "the [R]ule 23(b)(2) and (b)(3) devices may work in tandem," even when the plaintiffs have only sought certification under Rule 23(b)(2). In effect, the majority opinion suggests that courts are free to certify class actions as they wish, without regard to the character of the class action or the strictures of Rule 23. Such avoidance of the rules governing class certification contravenes both the intent of Rule 23 and the caselaw of this Court. *Allison*, 151 F.3d at 415 n. 9 ("[O]ur cases have adopted the position taken by the Rule 23 advisory committee that monetary relief may not be sought in a(b)(2) [sic] class action if it predominates over the requested injunctive or declaratory relief."); *McManus*, 320 F.3d at 554.

APPENDIX C

UNITED STATES DISTRICT COURT,
E.D. LOUISIANA.

Civ.A.No. MDL 1371

In re INDUSTRIAL LIFE INSURANCE LITIGATION

April 1, 2002

ORDER AND REASONS

FELDMAN, *District Judge.*

Before the Court is plaintiffs' Motion for Class Certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure of a class composed of:

> All African-Americans who own, or owned at the time of policy termination, an industrial life insurance policy that was issued as a substandard plan or at a substandard rate.

Plaintiffs claim authority for such certification is anchored to Fed.R.Civ.P. 23(b)(2) because, they argue, they are primarily seeking equitable relief. The Court is not persuaded. For the reasons that follow, the motion is DENIED.

I. *Background*

In these consolidated MDL proceedings, the plaintiffs aspire to certify a Rule 23(b)(2) class asserting that for decades the defendants, Monumental Life Insurance Company, The Western and Southern Life Insurance Company, and American National Life Insurance Policy,[1] have

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[1] Over the years, each of the defendants have acquired other insurance companies which were created by prior acquisitions. They have also

discriminated against African-Americans in the sale and administration of low-value life insurance policies (what they call "industrial life" insurance policies) in violation of 42 U.S.C. §§ 1981 and 1982. Generally, these policies have face amounts of $2000 or less, and require small weekly premiums. They assert that the companies sold black customers inferior policies at higher premium rates than they sold to white customers. Plaintiffs also claim that the defendants refused to sell black customers the same economically superior policies that they sold to white customers and that they imposed limitations on the policy amounts and other benefits when selling to black customers.

II. *Law And Application*

Parties seeking class certification must satisfy all of the Rule 23(a) prerequisites and the requirements of at least one of the categories of Rule 23(b). *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 975 (5th Cir.2000). Aside from the obvious mandate of Rule 23(a), the plaintiffs claim the approbation of Rule 23(b)(2). Rule 23(b)(2) informs the propriety of class status if:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed.R.Civ.P. 23(b)(2). Rule 23(b)(2) groupings require that: 1) the class members must have been harmed in essentially

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assumed blocks of in-force insurance policies which were issued by other insurance companies. Monumental currently administers policies issued by 200 different companies and Western and Southern has administered policies issued by approximately 80 companies. American National also assumed a large amount of in-force policies which were previously issued by other insurance companies. These policies were issued over many years to an estimated 1 million policy holders.

the same way by defendants' acts; and (importantly) 2) injunctive relief predominates over any monetary damages that are sought. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir.1998). Because plaintiffs fail to satisfy the requirements of the Rule 23(b)(2) class they wish to certify, the Court need not decide whether plaintiffs satisfy the demands of Rule 23(a), although oral argument unveiled serious adequacy of representation issues as well.

A. *Monetary vs. Injunctive Relief*

It is a truism to observe that where monetary relief predominates, certification under Rule 23(b)(2) is inappropriate. *Id.* In *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, the Fifth Circuit wrote:

> 'monetary relief predominates . . . unless it is incidental to requested injunctive or declaratory relief.'. . . [I]ncidental means that 'damages[ ] flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.' Thus, damages may be incidental when they are 'capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case.' [footnotes omitted].

Bolin, 231 F.3d 970, 975-76 (5th Cir.2000)(quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir.1998)). In that same case, the Fifth Circuit also expressed its concern (and echoed the concern of this Court) "that plaintiffs may attempt to shoehorn damages actions into the Rule 23(b)(2) framework, depriving class members of notice and opt-out

protections." *Id.* at 976. The Fifth Circuit pointedly added in *Allison* these very insightful comments:

> monetary relief 'predominates' under Rule 23(b)(2) when its presence in the litigation suggests that the procedural safeguards of notice and opt-out are necessary, that is, when the monetary relief being sought is less of a group remedy and instead depends more on the varying circumstances and merits of each potential class member's case.[2]

Id. at 413. *Bolin* and *Allison* focus intensely the concerns that became elevated in oral argument: this is a case in which individuality overrides any bland group-think, and money becomes the prime goal . . . not injunctive relief. Here, the plaintiffs say they seek: 1) an injunction prohibiting the collection of discriminatory premiums; 2) reformation of policies to equalize benefits; and 3) restitution of past premium overcharges or benefit underpayments. Determining whether this request is primarily for monetary or injunctive relief "involves consideration of the 'pragmatic ramifications of adjudication' and the effect of the relief sought, rather than any special attributes of the class involved." *Allison*, 151 F.3d at 416. The "pragmatic ramifications of adjudication" in this case are clear; many of plaintiffs' proposed class members, such as those who have already had their policies adjusted by the defendants, or those whose policies have lapsed, or those on which death benefits have been paid, would not benefit in any way from the injunctive relief requested, and thus, the request for declaratory relief only serves to bootstrap a more genuine interest in an award of monetary damages.

The Court also emphasizes that the Supreme Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) is

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[2] Plaintiffs have even suggested opt-out provisions could be applicable in this case.

particularly instructive on this issue. In *Great-West*, the Supreme Court stated that "[A]n injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity." *Id.*, 122 S.Ct. at 713. The Supreme Court tells us:

> Almost invariably . . . suits seeking(whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty. (citations omitted).

Id. Although not directly on point, *Great-West* provides persuasive authority for determining whether the real remedy is primarily for injunctive relief or monetary relief.

It must also be noted here that injunctive relief will not benefit anyone seeking to buy industrial life insurance in the future because the defendants no longer sell so-called Industrial life insurance and have not done so since the mid-1980's. Furthermore, the requested monetary relief is not incidental to the request for injunctive relief because it does not flow directly from the class as a whole: many and a variety of hearings would be required to determine personalized harm to each individual plaintiff because of the mass of policies involved, differing underwriting practices among some 280 companies, differing built in benefits, account dividends, and age at policy issuance.

The plaintiffs argue that Rule 23(b)(2) certification is especially appropriate for civil rights suits like this one. Yes. Civil rights suits may be well suited for 23(b)(2) certification. But where the request for relief is primarily and in actuality in the form of monetary relief, certification under 23(b)(2) fails. The true central relief sought by the plaintiffs in this case is for monetary damages. Rhetoric aside, that is the only

meaningful relief that could be given. Because the "requested injunctive relief is designed primarily to facilitate and ensure the satisfaction of any monetary relief the Court might award," [3] certification under Rule 23(b)(2) is inappropriate.

B. *Class Cohesiveness and Determination of Damages*

In addition to requiring that the primary request for relief be injunctive, Rule 23(b)(2) also insists that the class be cohesive.[4] Cohesiveness is problematic because of the number of different insurance companies that issued the policies in question.[5] Although plaintiffs speak of only three defendants, the policies were issued from approximately 280 different insurance companies which all had different underwriting and pricing procedures, involving perhaps a million policy holders. Even though the plaintiffs argue that the polices issued were all identical, in order to correctly assess damages the Court would still have to consider: 1) the plaintiff's age at the time the policy was issued; 2) whether the policy had built in benefits, such as a loss of limb benefit; 3) whether the premium as calculated was race-neutral; and 4) whether any dividends were paid on any policies. The Court would also have to consider the policies that had lapsed or that had been adjusted by defendants. There would need to be

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[3] *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 193 F.R.D. 505, 509 (W.D.Mich.2000).

[4] *Allison*, 151 F.3d at 413; *Bolin*, 231 F.3d at 974; *Barnes v. American Tobacco Co.*, 161 F.3d 127, 143 n. 18 (3d Cir.1998).

[5] The underlying premise of the (b)(2) class—that its members suffer from a common injury properly addressed by class-wide relief— "begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries." Thus, as claims for individually based money damages begin to predominate, the presumption of cohesiveness decreases while the need for enhanced procedural safeguards to protect the individual rights of class members increases, thereby making class certification under (b)(2) less appropriate. *Allison*, 151 F.3d at 413 (citations omitted).

a determination of which policies had been adjusted, the amount of the adjustment and whether the adjustment was sufficient. All of this further illustrates the need to conduct personalized hearings that focus the idiosyncracies of each policy and each purchaser. The Court disagrees with the plaintiffs' rather generalized argument that the amount of monetary damages could easily be determined on a class-wide basis. That is what they must argue, but their argument is betrayed by the facts. The number of policies involved, the varying underwriting practices, all seem to make a grouping of monetary relief unrealistic at best.

Because the plaintiffs have also not satisfied the class cohesiveness requirement of Rule 23(b)(2), the Court declines to certify plaintiffs' proposed class. The Court must now turn to another serious concern.

C. *Statute of Limitations*

The defendants also point out that the plaintiffs' request for class certification should be denied because the Court would have to hold individualized hearings on a seriously asserted statute of limitations issue. The plaintiffs over simplify when they respond that the Court could find on a class-wide basis whether the plaintiffs had constructive knowledge of the alleged discrimination. The Court does not agree and finds this response to have no merit. The defendants have introduced evidence that information concerning the insurance practices at issue has been readily available in the national and local media for many years. The information is in the form of newspaper and magazine articles and television reports from different areas of the country.[6] Thus, whether a

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[6] Defendants refer to many news reports of alleged race-based pricing in insurance policies including: 1) a *Time Magazine* article from March 23, 1936; 2) a *Detroit News* article from September 26, 1936; 3) a *Milwaukee Journal* article from May 23, 1950; 4) a *Washington Post* article from March 1, 1983; 5) a Philadelphia Inquirer article from March 2, 1983; and 6) a 1979 special on *60 Minutes*.

plaintiff in Michigan, as compared to a plaintiff in Louisiana, had constructive notice, is a fact issue which needs to be determined individually and not on a class-wide basis.[7]

Moreover, different state laws have differing time-barring periods that would involve procedures that run afoul of the Fifth Circuit's strict scrutiny in *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir.1996). States differ regarding issues like, for example, fraudulent concealment and overt misrepresentations. Plaintiffs had little persuasive enthusiasm in their response to the limitations concerns that have been raised. Their arguments did not adequately reach the obvious point made in the *Barnes* decision, that notice is a personalized fact issue.

Accordingly, because the plaintiffs' have failed to satisfy the requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure, their motion for class certification is DENIED. [8]

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[7] *See Barnes v. American Tobacco Co.*, 161 F.3d 127, 149 (3d Cir.1998)("[D]etermining whether each class member's claim is barred by the statute of limitations raises individual issues that prevent class certification.").

[8] The Court's decision today obviously does not deal with the serious merits of plaintiffs' grievances. In fact, the Court cannot overlook its discomfort that one company's papers distinguish between "colored" persons and Caucasians, and that still another company had two premium grading policies, one for African-Americans and one for Caucasians. Defendants' response that these were state-permitted underwriting practices that involved socio-economic factors and not race-intended discrimination could be seen, preliminarily, as somewhat limp. But the Court cannot disregard the requirements of Rule 23 and its application to the facts before the Court.

APPENDIX D

Federal Rule of Civil Procedure 23. Class Actions

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and

that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.*

(1)(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,

- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed

extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Settlement, Voluntary Dismissal, or Compromise.*

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an

earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) *Appeals.* A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) *Class Counsel.*

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) *Appointment Procedure.*

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) *Attorney Fees Award.* In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) *Motion for Award of Attorney Fees.* A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and,

for motions by class counsel, directed to class members in a reasonable manner.

(2) *Objections to Motion.* A class member, or a party from whom payment is sought, may object to the motion.

(3) *Hearing and Findings.* The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) *Reference to Special Master or Magistrate Judge.* The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 27, 2003, eff. Dec. 1, 2003.)

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No. 04-27

IN THE

Supreme Court of the United States

AMERICAN NATIONAL INSURANCE COMPANY, MONUMENTAL LIFE INSURANCE COMPANY, AND THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY,
Petitioners,

v.

MATTIE BRATCHER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit correctly ruled—under its *Allison* standard the parties agreed applied—that Federal Rule of Civil Procedure 23(b)(2) authorizes class certification of respondents' civil rights claims where the class does not seek compensatory or punitive damages; at least one million class members can benefit from injunctive relief because the race-based insurance policies the petitioning insurers sold them are still in-force; class members each seek $300-$500 in restitution of discriminatory premiums they paid which "negative value" relief flows directly from the insurers' liability to the class as a whole, and can be objectively calculated just as the insurers claim they did in "voluntarily adjusting" some of their race-based policies.

PARTIES

Respondents Mattie Bratcher, John Bratcher, Caroline Brown, Mildred Buford, Maxine Cash, Harriett DeLoach, Sophia Drakeford, Mary Sue Truesdale, Elizabeth Walker, Rosemary Roach, Joseph Bell, Willa Ellis, Alma Hyde, and Thelma Walker Oatis, appearing individually and as representatives of all persons similarly situated ("Policyholders"), are African-American owners, holders or beneficiaries of industrial life insurance policies issued by the insurance company petitioners ("Insurers"). Policyholders were plaintiffs and appellants below who sued the petitioning Insurers for injunctive relief and equitable restitution under 42 U.S.C. §§1981-1982, alleging intentional racial discrimination in the excess premiums charged and reduced benefits provided under their insurance policies.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The petition should be denied because the asserted conflict among the circuits concerning the controlling standard for Federal Rule of Civil Procedure 23(b)(2) class certification was never raised in the lower courts and is not presented by the record in this case. In the lower courts, the petitioning insurance company defendants ("Insurers") relied on the standards articulated in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), for determining Rule 23(b)(2) class certification. Respondents, African-American policyholders ("Policyholders") who sued Insurers for race discrimination

in the sale of insurance did not contend that Allison was the wrong standard. Instead, Policyholders carefully limited their claims to comply with *Allison*. Contrary to Insurers' repeated assertions that Policyholders seek damages (Pet. 2-4, 14, 18, 20, 25-27), the complaints do not include claims for compensatory or emotional distress damages, and Policyholders withdrew their claim for punitive damages in applying for class certification. (CR 351 at 31:18R 5890)

A class may be certified under Rule 23(b)(2) when: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Citing the Advisory Committee Notes, this Court has stated that civil rights class actions are particularly well-suited for Rule 23(b)(2) certification. *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples.").

This is a civil rights action under 42 U.S.C. §§ 1981-1982, whose "negative value" circumstances present a paradigm for Rule 23(b)(2) class certification. Policyholders were sold industrial life insurance by the three Insurers or their affiliates. The complaints allege that all such policies, usually in the amount of $2,000 or less, were distorted for decades by the Insurers' intentional race-based discrimination in either charging higher premiums ("dual rates") or providing lower benefits ("dual plans") to black Policyholders as compared to the same policies sold to whites. The Insurers concealed the fact that they had what they labeled "colored" rate books.

In ruling on class certification in this case, the lower courts applied the *Allison* standard. In *Allison*, the Fifth Circuit held that Rule 23(b)(2) class certification was unjustified where plaintiffs' claims for compensatory and punitive damages

were predominant to any injunctive relief sought. *Allison*, 151 F.3d at 425. By contrast, in this case, the Fifth Circuit panel majority correctly held, under *Allison*, that monetary claims did not predominate over Policyholders' claims for injunctive relief in light of the following circumstances:

- Conflicting party experts agree there are at least one million (and plaintiffs' expert estimates 4.5 million) race-based industrial life insurance policies still in-force that could benefit from injunctive relief;
- Instead of compensatory and punitive damages claims, Policyholders seek $300 to $500 each in equitable restitution to make them whole for the higher "colored" premiums they paid Insurers, which relief flows directly from the Insurers' discriminatory conduct toward the class as a whole; and
- Such restitution is capable of objective calculation of the difference between what a black and white person paid for the same policy, just as Insurers themselves claim to have done in "remediating" some of their race-based policies using their own records and actuarial formulas.

(App. 15a-19a) The Fifth Circuit majority opinion, authored by Judge Smith (who also joined in *Allison*), aptly characterized Policyholders' restitution claim here as "the ultimate 'negative value' class action lawsuit," justifying Rule 23(b)(2) class certification. (App. 3a)

In *Allison*, the Fifth Circuit recognized that the existence of a negative value suit is the "most compelling rationale" for certifying a class action. *Allison*, 151 F.3d at 420. As this Court explained, a negative value suit is one in which class members' claims "would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not

available." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

In sum, contrary to the petition, any conflict among the courts of appeals about the correct standard for Rule 23(b)(2) class certification is not presented by this case. All parties accepted *Allison* as the applicable standard, and Policyholders demonstrated that their negative value civil rights claims met the *Allison* test. The Fifth Circuit ruled against the petitioning Insurers applying the Allison standard they proposed. Since no issue worthy of certiorari is presented, the petition should be denied.

STATEMENT OF THE CASE

1. Respondents are a class of African-American Policyholders to whom the petitioning Insurers sold low-face-value "industrial" life insurance policies, usually with a death benefit of $2000 or less. (3/20/02 Transcript ("Tr.") 13) Policyholders allege that the Insurers, American National Insurance Company ("ANICO"), Monumental Life Insurance Company ("Monumental"), and Western & Southern Life Insurance Company ("Western & Southern"), and their affiliates, engaged in a pattern of intentional racial discrimination as a matter of deliberate company-wide policy. Although there were 280 affiliated companies, their race-based practices were systematic, uniform and consistent. Specifically, Insurers placed their African-American Policyholders in (i) higher-priced policies (dual rates) or (ii) reduced benefit policies (dual plans), than comparable policies sold to whites. (App. 4a)

The Insurers marketed their industrial life policies to low-income working class people. To African-American workers, the Insurers hawked these policies as "burial" insurance to avoid the humiliation of a pauper's grave. (8R 2502, 2518) Insurers' agents sold the policies and then collected $0.25 to $2.00 premiums weekly or monthly by door-to-door home

visits. (8R 2501) Insurers charged African-Americans higher rates, or paid lower benefits for decades and fraudulently concealed such practices. (*Id.*; Tr. 39). Western & Southern had policy rates labeled Standard Series (White Risks)" and "Class A Series (Colored Risks)." (CR 351 at 18, Diliberto Decl., Ex. 24)

Insurers concede they have "charged different rates to African-Americans and Caucasians." (Pet. 6) An ANICO representative testified in deposition that the company had Standard 1 and Standard 3 industrial policies: "I believe the Standard No. 3 products were sold only to African Americans." (CR 351 at 11-12, Halper Decl., Ex. 2:Dep. 40-42) A Monumental affiliate also sold "colored" premium policies. (CR 379, Wright Decl. Ex. 7:Lotter Supp. ¶¶8-9) Insurers' own statistics expert, Dr. Sangha, testified "correct" when asked in deposition whether "each of these companies" "charged African-Americans more than they charged Caucasians for the same product." (CR 351 at 4, Halper Decl., Ex. 21:Dep. 54:7-17) The Insurers' actuarial expert, Mire, acknowledged that it "was not an uncommon practice in the industry" that insurance companies "in some time periods did have race distinct rate systems that charged African Americans higher premiums." (CR 367, Mire ¶76)

2. Policyholders filed suit against the Insurers under the civil rights laws–42 U.S.C. §§ 1981-1982–seeking injunctive relief to stop the Insurers from continuing to collect the excess race-based premiums, from paying inferior benefits, and to reform the in-force policies. (App. 5a) Policyholders do not seek compensatory or punitive damages. (CR 351 at 31) Policyholders also narrowed the class definition so that it did not encompass black Policyholders who were charged higher rates based on subjective socio-economic criteria. (CR 351 at 22 & n.28; Tr. 38) Only class members who the Insurers charged higher premiums or provided lower benefits based solely on race are included in the class. *Id.*

Policyholders' complaints also seek disgorgement and equitable restitution of the excess race-based premiums Insurers wrongfully collected from them. (8R 2509-10, 2525, 3612; App. 5a) The restitution Policyholders seek is classic "negative-value" recovery of amounts ranging from $300 to $500 per policy in most cases. (App. 3a) For example, a black policyholder who pays 50 cents per week for a $500 policy will pay $650 if payments are made for 25 years ($0.50 x 52 weeks x 25 years). A white insured who pays only 25 cents per week for the same policy pays only $325. Thus, the race-based amount collected was $325. If five million such policies were sold, the insurers collected some $1.6 billion in race-based premiums over a 25-year period.

But these policies were in effect much longer. The named Policyholders purchased their policies between 1937 and 1974, and they are still in force. (CR 351 at 8, 13, 20-21) Although the Insurers began to discontinue selling new overtly race-based premium and benefit policies in 1964, such sales continued through 1981. (Tr. 19:22) Insurers continue to collect discriminatory premiums from African-Americans on policies sold 20 to 40 years ago. (CR 351 at 14, Halper Decl., Ex. 11-13)

In 1988, under pressure from regulators, Insurers Western & Southern and ANICO began sporadic partial adjustment ("remediation") of their policies to remove the race-based disparities. (CR 351 at 4, 9, 15, 19) Monumental has not adjusted any race-based policies, and ANICO has adjusted only one of its four policies. (CR 351 at 9, 15, Halper Decl., Ex. 11, Cravins Decl., Ex. 22) Policyholders' expert estimated, that 4.5 million of 5.6 million industrial policies remain in force. (App. 5a) Defendants' expert claimed 80% of those policies had lapsed, been paid off, were no longer in-force, or had been remediated. (App. 5a) But, even under his estimate at least one million policies remain in-force and unremediated. At the hearing, Insurers' counsel acknow-

ledged "we can estimate, but we don't know" how many policies remain in-force. (Tr. 31:18) The district court admitted both reports in evidence (Tr. 5:4), did not explicitly accept or reject either one, but implicitly concluded that at least one million policies were in force. (App 51a-52a n.1)

Insurers' belated remediation of some of their own policies unwittingly acknowledges that their records are sufficient to calculate the disparities in premiums and benefits in their discriminatory, dual rate and dual plan policies, since they claim to have "voluntarily adjusted" those policies themselves. (App. 16a, 19a) Insurers admit they have policies, rate books, and computerized data on their policies. (CR 351 at 10)

Due to the nature of the Insurers' practices, class members were unable to discover the discriminatory conduct until the late 1990s. Because the Insurers never disclosed their discriminatory "colored" rate books to Policyholders and priced their policies in a fashion that made any comparison of premiums all but impossible, Policyholders had no ability to discover that they had been disadvantaged by the Insurers' discriminatory practices. The Insurers, however, claim that class members should have known of the discriminatory conduct. The Insurers point to media articles that appeared sporadically around the country. Much of this infrequent media treatment appeared in newspapers of national circulation. (App. 21a) At most, some of the publications vaguely comment that "white insurance companies charged African-Americans more for life insurance." None of the publications identifies the Insurers named in this case or discusses their discriminatory practices.

3. Pursuant to Federal Rule of Civil Procedure 23(b)(2), Policyholders moved to certify a class comprised of: "All African-Americans who own, or owned at the time of policy termination, an industrial life insurance policy that was issued as a substandard plan or at a substandard rate." (App. 6a)

Although the district court consolidated the separate actions against the three Insurers to determine class certification (3R 945), Policyholders seek to certify a separate Rule 23(b)(2) class against each of the three Insurers. (19R 6382) The district court denied class certification. The court ruled that monetary relief predominated over injunctive relief because the Insurers no longer sell industrial life insurance and because a majority of the policies previously sold have either been paid, lapsed or adjusted, or are no longer in-force. (App. 54a-56a) The district court also stated that "the requested monetary relief is not incidental to the request for injunctive relief because it does not flow directly from the class as a whole . . . ." (App. 55a)[1] The court also concluded "personalized hearings" would be required to determine the harm "to each individual plaintiff" caused by the Insurers "differing underwriting practices," polices and pricing. (App. 55a-57a) The district court also believed that individualized hearings would be required to address statute of limitations issues, rejecting Policyholders' argument that fraudulent concealment and constructive notice could be determined on a class-wide basis. (App. 57a)

4. The Fifth Circuit accepted Policyholders' Federal Rule of Civil Procedure 23(f) appeal (20R 6563), and reversed. (App. 3a) The panel majority held that (i) because one million to 4.5 million industrial policies remained in-force, a sufficient proportion of the class was still paying discriminatory rates and thus could benefit from injunctive relief, (ii) equitable restitution of the higher premiums paid (or lower benefits received) could be objectively calculated

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[1] The district court's statement that monetary relief "does not flow directly ***from the class*** as a whole" mistakenly reads the Rule 23(b)(2) standard backwards. (App.55a, emphasis added) Under the *Allison* standard, monetary relief must "flow directly from [defendants'] liability ***to the class*** *as a whole*." *Allison*, 151 F.3d at 415 (emphasis added, italics by the Court).

by comparing the Insurers' own policies and records for black and white rates and benefits without individualized subjective evidence–just as Insurers claimed they had done in remediating some policies, and (iii) petitioners' statute of limitations defense could be determined on a class-wide basis because the Insurers relied on a theory of constructive notice. (App. 9a-21a)

Judge Smith's opinion for the Fifth Circuit panel majority applied the standard in *Allison*, 151 F.3d at 415, "that monetary relief, to be viable in a rule 23(b)(2) class, must 'flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief.'" (App. 11a, italics in original) The panel majority held that the class could be certified under Rule 23(b)(2) consistent with *Allison*. (App. 10a) The panel explained that, in contrast to this case, in cases where only a negligible portion of a class would benefit from injunctive relief, Rule 23(b)(2) certification is not appropriate, as was true in *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 978 n.46 (5th Cir. 2000) (only one of one million class members faced further harm that could benefit from an injunction). (App. 11a-12a) The panel majority pointed out that in this case, where one million to 4.5 million policies remain in-force on which Insurers continue to collect discriminatory premiums, the class is properly seeking and can benefit from injunctive relief. (App. 12a)

The panel majority also ruled that "assuming that unlawful discrimination is found, class members automatically will be entitled to the difference between what a black and a white paid for the same policy." (App 17a) The panel added that the Insurers' own records contain the information needed to compare black and white policies: "Defendants' complaints to the contrary are belied by the fact that, since 1988, many policies have been adjusted [by the Insurers themselves] to account for racial disparity." (App 19a).

The panel reversed the district court's ruling that Insurers' statute of limitations defense raised individual issues precluding class certification. The panel pointed out that Policyholders alleged that the Insurers engaged in a common scheme of fraudulent concealment and that Insurers defended on a theory of constructive notice. To the panel, both issues were determinable class-wide because federal law determines when the limitations period accrues. (App. 19a) Insurers did not contend or proffer evidence that the sporadic media reports of race discrimination in the insurance industry were local, regional or individual in scope–but rather were national and therefore determinable class-wide. (App. 20a-21a) Insurers' petition for rehearing en banc was denied without a single judge calling for a vote. (App. 3a)

REASONS FOR DENYING THE PETITION

A. The Writ Should Be Denied Because Any Asserted Conflict Among the Circuits Claimed in the Petition Was Never Raised in the Lower Courts Where the Parties Agreed that the Fifth Circuit's *Allison* Standard for Rule 23(b)(2) Class Certification Controls

This case is not appropriate for review to resolve a circuit split–if one exists. First, in the district court and on appeal, the petitioning Insurers embraced the Fifth Circuit's standard in *Allison*, 151 F.3d at 415, because it sets forth the strictest test for Rule 23(b)(2) class certification. Second, the petition concedes that *Allison* expresses the majority rule endorsed by at least four other circuits. Third, respondent Policyholders carefully narrowed the class to satisfy *Allison* and never urged the lower courts to use any other standard. This case was litigated by the parties and decided by the courts entirely under the *Allison* standard. In short, this case involved a fact-specific and fact-bound application of the *Allison* standard. Insurers' unsupported claim of "forum-shopping" (Pet. 23) is

belied by Policyholders' filing their suits in Louisiana and Texas district courts–governed by *Allison*.

Apparently recognizing that no circuit conflict in standards is presented in this case, Insurers roll out their "parade-of-horribles" strategy. (Pet. 21-29) They begin by suggesting that class actions "call into question the structure, operation, and survival of entire businesses or industries." (Pet. 21) They claim the boundary between Rule 23(b)(2) and 23(b)(3) classes is "vanishing." (Pet. 24) Insurers also complain that "thousands of class actions" are pending (Pet. 21)–but do not explain why that is inappropriate and ignore how few are even certified.

This Court has expressed skepticism about such "sky-is-falling rhetoric" by corporations trying to avoid liability for racial discrimination: "We do not believe that disparate impact theory need have any chilling effect on legitimate business practices." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988).

The petitioning Insurers are on the wrong battlefield. They seek review by writ of certiorari to resolve a supposed circuit split concerning the controlling standard for Rule 23(b)(2) class certification. Yet, the parties in this case never disputed the legal standard that applied. The Insurers said Allison controlled, the policyholders agreed, and the lower courts applied *Allison*. In sum, there was a straight-forward application of *Allison* to the factual circumstances of this case that no active judge of the Fifth Circuit, including the dissenter, thought worthy of even a vote for en banc rehearing. (App. 3a)

B. The Writ Should Be Denied Because the Record Does Not Present a Recurring and Important Question but Rather a Fact-Bound Application of the *Allison* Standard

1. The Class Does Not Seek Compensatory or Punitive Damages

Quoting isolated snippets from Judge Smith's opinion for the Fifth Circuit panel, the petitioning Insurers repeatedly claim on nearly every page of their petition that the class seeks "damages." (Pet. 2-4, 14, 18, 20, 25-27) Insurers refuse to acknowledge that Policyholders never sought compensatory or emotional distress damages in their complaint and withdrew their claim for punitive damages in applying for class certification. Instead, Policyholders only seek restitution for past premium overcharges. Petitioners never mention the negative value–a few hundred dollars–of each class member's restitution claim, doubtless because it provides compelling justification for class certification. *Shutts*, 472 U.S. at 809.

By misdirecting the analysis to damages, Insurers hope to avoid judicial scrutiny of the class-wide impact of the invidious race discrimination they practiced for 50 years under the guise of what they still attempt to excuse as "sound actuarial calculations." (Pet. 7) Even as the district judge denied class certification, however, he expressed dismay at petitioners' attempt to rationalize their overtly discriminatory "colored" rate books:

> The Court cannot overlook its discomfort that one company's papers distinguished between "colored" persons and Caucasians, and that still another company had two premium grading policies, one for African-Americans and one for Caucasians. Defendants' response that these were state-permitted underwriting practices that involved socio-economic factors and

> not race-intended discrimination could be seen, preliminarily, as somewhat limp.

(App. 58a–n.8) Earlier, at the class certification hearing, the district court found that "at least two of these companies apparently have come about as close as possible to admitting that they are discriminating." (Tr. 14:3-5) When insurance company counsel contended that "this was legal at the time," the court bristled: "don't tell me it was legal." (*Id.* Tr. 22-23)

2. At Least One Million and Up to 4.5 Million Class Members Seek and Can Benefit from Injunctive Relief

The parties offered conflicting expert reports that included estimates of the number of industrial life insurance policies still in-force. Insurers claimed that most of their policies had been paid off, lapsed or adjusted. Their expert estimated 80% of the 5.6 million industrial policies had been terminated–meaning one million were still in-force. (CR 382, Mire Supp. ¶3) Insurers counsel acknowledged "we can estimate but we don't know." (Tr. 31:18) Policyholders' expert estimated that only one million of 5.6 million policies had terminated and that 4.5 million were still in-force. (CR 379) The district court admitted both reports in evidence. (Tr. 5:4), but made no finding between them except to implicitly accept the one million estimate both experts agreed upon. (App. 51a-52a n.1)

The Fifth Circuit majority noted both estimates and concluded that a substantial number of class members, at least one million, could benefit from injunctive relief, which was sufficient to justify certifying a Rule 23(b)(2) class. (App. 5a, 12a) The panel distinguished an earlier Fifth Circuit decision in *Bolin* rejecting Rule 23(b)(2) class certification because the record in that case revealed only one class member could benefit from injunctive relief. *Bolin*, 231 F.3d at 978 n.46. The panel majority decision in this case is consistent with the

Third Circuit's reasoning that not all class members need benefit from injunctive relief, as long as a substantial proportion of the class benefits–as was true here. *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 253 (3d Cir. 1975).

In sum, the experts agreed that at least one million (and plaintiffs' expert estimated 4.5 million) race-based policies remain in-force upon which Insurers collect excess premiums. Insurers should not be collecting "colored" rates from even one policyholder. Their continued collection from a million or more black citizens justifies class-wide injunctive relief under Rule 23(b)(2).

3. The Class Seeks Restitution of a Few Hundred Dollars Per Class Member that Flows Directly from Insurers' Liability to the Class and Can Be Objectively Calculated Using Insurers' Own Records

As the district court observed, Insurers have admitted in deposition that they maintained a higher rate–lower benefit "colored" policy structure. (App. 58a–n.10; Tr. 14) Thus, there is a strong likelihood that Policyholders will be able to sustain their burden of proving that Insurers engaged in a systematic practice of race-based discrimination in violation of 42 U.S.C. §§1981-1982; *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-37 (1977). Sections 1981 and 1982 bar racial discrimination in contracts and sale of property by private individuals–including Insurers. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417-37 (1968). These provisions are designed "to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." *Id.* at 443.

Once liability is found, the civil rights laws provide for injunctive relief to eliminate so far as possible, the last vestiges of Insurers' discriminatory practices. *Teamsters*, 431 U.S. at 364. An equally important remedy is "to make

persons whole for injuries suffered" as a result of the Insurers' unlawful discrimination. *Id.*; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 413-23 (1975). In Albemarle, this Court stated that "[w]here racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 418 (citation omitted); *accord Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770-71 (1976).

Both remedies justify class certification in this case. As previously discussed, those Policyholders still injured by in-force policies will benefit from injunctive relief to stop collection of discriminatory premiums and to reform policies to equalize benefits. But such remedies would be of "of little comfort to the victims" of the Insurers' earlier discrimination "and could not erase [their] previous illegal conduct or its obligation to afford relief to those who suffered because of it." *Teamsters*, 431 U.S. at 341-42.

In *Albemarle*, this Court held that "back pay may be awarded on a class basis" to make-whole the victims of employment discrimination. 422 U.S. at 414 n.8. In this case, the Fifth Circuit panel held that the Policyholders' claim for restitution of the "difference between what a black and white paid for the same policy" is a remedy that flows "from liability in much the same manner that an award of back pay results from a finding of employment discrimination." (App. 17a) In *Allison*, the Fifth Circuit stated that "if the instant case involved only claims for equitable monetary relief, Pettway [a back pay case] would control." *Allison*, 151 F.3d at 415-16. Equitable monetary relief is exactly what Policyholders seek in this case–and it should be available to a Rule 23(b)(2) class. Policyholders are not seeking damages to which they are contractually entitled under the insurance policies. They are seeking disgorgement and true

restitution of money wrongfully taken by Insurers that "in good conscience" belongs to Policyholders. *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-51 (2000).

Insurers nevertheless assert that individual hearings would be required to determine the amount of each class members' restitution, and that such determination would be complicated by differing underwriting practices, benefits, and age at policy issuance, of the numerous policies issued. As the Fifth Circuit aptly observed, however, Insurers' sky-is-falling rhetoric is "belied by the fact that, since 1988, many policies have been adjusted to account for racial disparity." (App. 19a) Insurers themselves claimed they remediated many of their industrial policies. (App. 5a) They used their own records, rate books and policies and the same standardized actuarial formulas proposed by the class. (App. 18a) While there are a number of policy variables, none require subjective evidence and all "are identifiable on a classwide basis." (App. 18a)

The Insurers' actuarial expert acknowledged that industrial life policies were "very simple" and were offered in only seven basic plans. (CR 367, Mire ¶30) He also acknowledged these low face amount policies usually had only two rate classes. (Id. ¶70) Policyholders' actuarial expert stated that the disparities could be calculated using formulas and grids. (CR 351, Lotter at 31; CR 379, Lotter ¶¶2-6, 11) As the panel majority concluded: "assuming that unlawful discrimination is found, class members automatically will be entitled to the difference between what a black and a white paid for the same policy." (App. 17a) This conclusion was fully consistent with the *Allison* standard because, as the panel majority explained, unlike *Allison*, none of the few policy variables in this case required "the gathering of subjective evidence" as would be true if class members sought compensatory or punitive damages. (App. 17a)

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

AMERICAN NATIONAL INSURANCE COMPANY, MONUMENTAL LIFE INSURANCE COMPANY, AND THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY

Petitioners,

v.

MATTIE BRATCHER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Brief in Opposition ("Opp.") is most remarkable for the points it does not contest. It does not dispute the existence of an explicit conflict among the Circuits on the standard for Federal Rule of Civil Procedure 23(b)(2) class certification. It does not address – let alone dispute – the tension between the decision below and *Ticor Title Insurance Co.* v. *Brown*, 511 U.S. 117 (1994), *Ortiz* v. *Fibreboard Co.*, 527 U.S. 815 (1999), and *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). It *acknowledges* that numerous courts of appeals ignore Rule 23's distinct criteria for certification of (b)(2) classes seeking injunctive relief and (b)(3) classes seeking money damages, and treat Rule 23 as an *a la carte* menu from which a court can order class certification under (b)(2) and mandatory notice under (b)(3), and yet omit (b)(3)'s opt-out rights and predominance and manageability requirements. Finally, plaintiffs admit that between 20 and 82% of the class would *receive no benefit from an injunction*, because the Insurance Companies have not offered dual rates or policies for decades, and numerous policies have lapsed or been adjusted. Opp. 13.[1]

Plaintiffs' tacit agreement with numerous points in the petition demonstrates that the decision below warrants review. Only this Court can resolve the circuits' disparate approaches to Rule 23(b)(2) certification. And, plaintiffs' admission that between 20 and 82% of class members will not benefit from any injunction, in combination with the Fifth Circuit's acknowledgement that individual damages "depend on the idiosyncrasies of the particular dual rate or dual plan policy" (App. 16a), make this case an appropriate vehicle for resolving the conflicting tests for Rule 23(b)(2) certification.

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[1] Plaintiffs falsely state that the sale of dual rate and plan policies did not cease until 1981. Opp. 6. The Fifth Circuit found it "undisputed" that such sales had ended by "the early 1970s." App. 5a.

None of plaintiffs' arguments casts doubt on the preceding propositions. Plaintiffs first contend that the "conflict among the circuits claimed in the petition was never raised in the lower courts." Opp. 10 (capitalization omitted). This Court requires only that the *legal issue* presented (the standard for Rule 23(b)(2) certification), not the conflict in the circuits, be "'pressed or passed upon'" by the lower courts. *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002). In any event, the Court's actual conditions for review *and* plaintiffs' made-up condition are satisfied. After the district court's denial of class certification was reversed, the Insurance Companies petitioned for rehearing *en banc*, arguing that the Fifth Circuit's approach to Rule 23(b)(2) certification violated Rule 23 and their due process rights, and conflicted with that of other circuits. See Pet. Reh'g En Banc at 6-8, 11-14, No. 02-30540 (5th Cir. filed Aug. 27, 2003).

Plaintiffs next argue that this case involves only an erroneous application of *Allison*'s incidental-damages test. In fact, however, the Circuits employing the incidental-damages approach are fundamentally inconsistent about when damages are "incidental." The decisions in *Ticor*, *Ortiz*, and *Shutts* have left the circuits in disarray about both whether Rule 23(b)(2) classes can *ever* be certified when money damages are sought, and whether Rule 23 allows courts to grant notice and opt-out rights to (b)(2) classes to address the Court's due process concerns. In addition, under the Second and Ninth Circuits' *ad hoc* approach, which focuses on plaintiffs' subjective intent in filing suit, the class at issue would *not* have been certified, because the alleged discrimination had ceased and "the true central relief sought . . . in this case is for monetary damages." App. 55a.

Plaintiffs' remaining arguments cite specific features alleged to make this case a poor vehicle for resolution of the Rule 23(b)(2) standard. These arguments all lack merit. See Part II. This case provides the Court with an opportunity to

resolve when, if ever, Rule 23(b)(2) certification is lawful for a class seeking money damages.

ARGUMENT

I. THE QUESTION PRESENTED WAS DECIDED BELOW AND THIS COURT SHOULD RESOLVE THE CIRCUITS' CONFLICTING APPROACHES AND RESTORE UNIFORMITY TO RULE 23.

Plaintiffs effectively concede both the existence of a mature conflict among the circuits regarding the proper standard for certifying a Rule 23(b)(2) class, and the irreconcilable tension between the circuits' standards and the due process concerns stated by this Court in *Ticor*, *Ortiz* and *Shutts*. See Pet. 14-20. But, plaintiffs argue that the petition should be denied because the conflict was not raised below. Opp. 10. Plaintiffs claim that despite prevailing in the district court, the Insurance Companies were required to argue to the Fifth Circuit that (i) they would prevail under the legal test applied by two other circuits, and (ii) the decision the court had not yet made placed it in conflict with other circuits. This argument is based on factual error, is legally wrong, and makes no sense.

In fact, the district court agreed with petitioners that the class could not legally be certified under Rule 23(b)(2). On appeal, the Insurance Companies defended that decision as consistent with the Fifth Circuit's *Allison* test, as they were required to do. See, *e.g.*, *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 411 n.3 (5th Cir. 1998) ("in the absence of a clearer statement by the Supreme Court or en banc reconsideration of the issue, the panel is bound by circuit precedent"). Once the court of appeals reversed the district court's determination, however, petitioners sought rehearing *en banc*, arguing that the decision (a) "destroys any distinction between (b)(2) and (b)(3)" (Pet. for Reh'g En Banc at 7), (b) authorizes certification where most of the class

could not benefit from an injunction and where "'complex individualized [damages] determinations'" are required (*id.* at 7-8), (c) is inconsistent with *Ticor* and with the due process rights of plaintiffs and defendants (*id.* at 11-12), and (d) conflicts with four other circuits' predominance tests and with the alternative approach adopted by the Second and Ninth Circuits (*id.* at 13-14). In sum, petitioners addressed the conflict with other circuits, with this Court's decisions, and with Rule 23 as soon as that conflict occurred.

On certiorari review, this Court requires only that the *legal issue* presented (whether the class can be certified under Rule 23(b)(2)) be "'pressed'" or "'passed upon'" in the lower courts. *Verizon*, 535 U.S. at 530. This rule has special force where, as here, "the issue . . . is in a state of evolving definition and uncertainty" and is of "importance to the administration of federal law." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (internal quotation marks omitted). Cf. *Yee* v. *City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) (if the issue is decided below, the petitioners may "formulate[] any argument they like[] in support of that claim here"). Resolution of intercircuit conflicts is the province of this Court. In any event, the Court's actual conditions for review and plaintiffs' asserted requirement that the conflict be raised below are all fulfilled here.

Plaintiffs' additional, implicit contention is that this case is not worthy of review because it is just a botched application of *Allison*'s standard. Plaintiffs do not even address the effect of *Ticor*, *Ortiz* and *Shutts*. This case embodies the continuing conflict surrounding the standard for Rule 23(b)(2) certification, and the degeneration of Rule 23. Circuits employing *Allison*'s incidental-damages test take conflicting approaches in determining when money damages are "incidental." These courts admittedly need guidance about whether Rule 23(b)(2) classes seeking money damages can be certified by the device of providing (b)(3) notice and opt-out rights to class members. Pet. 18-20. See, *e.g.*, *Allison*, 151

F.3d at 411 n.3 (*Ticor* "casts doubt on the proposition that class actions seeking money damages can be certified under Rule 23(b)(2)"). The class at issue could not legally have been certified if the court had either adopted the approach set forth in *Ticor* or adhered to Rule 23.

Finally, the Insurance Companies plainly would have prevailed under the Second and Ninth Circuit's test which focuses on the plaintiffs' subjective "intent . . . in bringing the suit," *Molski* v. *Gleich*, 318 F.3d 937, 950 (9th Cir. 2003). Because the Companies ceased the contested practices decades ago, there is no dispute that the "true central relief sought by the plaintiffs in this case is for monetary damages" and that the class could have only been certified, if at all, under (b)(3). App. 55a. See also Brief *Amicus Curiae* Chamber of Commerce at 12-14; Pet. Reh'g En Banc at 13-14.

In sum, the circuits employ explicitly and implicitly conflicting Rule 23(b)(2) standards, and those standards also conflict with Rule 23, as analyzed in this Court's decisions. Because the uniform interpretation of Rule 23 is critically important to the administration of justice in this country, this Court's intervention is urgently required.

II. THIS CASE POSES CRITICAL QUESTIONS CONCERNING WHEN, IF EVER, A RULE 23(B)(2) CLASS SEEKING MONETARY DAMAGES CAN LAWFULLY BE CERTIFIED.

Plaintiffs make a series of case-specific arguments that this is not a good vehicle for resolution of the Rule 23(b)(2) standard. We respond in detail to demonstrate that the important issue presented can readily be decided here.

First, plaintiffs claim that Rule 23(b)(2) certification is lawful because they do not seek legal damages, but rather the equitable restitution of past premium overcharges. They fail to mention that both lower courts rejected this assertion. App. 15a-16a; 54a-55a (citing *Great-West Life & Annuity Ins. Co.*

v. *Knudson*, 534 U.S. 204 (2002)). In *Great-West*, this Court expressly held that restitution is equitable where a plaintiff "'assert[s] title or right to possession of particular property,'" but is *legal* where a plaintiff has only a legal "'ground[ ] for recovering money'" such as that held by a general creditor. 534 U.S. 204, 213 (2002). Plaintiffs do not seek equitable damages because they do not seek money or property that can "clearly be traced to particular funds or property in the defendant's possession." *Id.*[2]

In addition, plaintiffs ignore that for purposes of Rule 23(b)(2), the inquiry is not whether the relief is equitable or legal, but whether the relief flows uniformly to the class "as a whole," or must be individually determined. If the determinations are individual, the money damages are not incidental. App. 15a-16a (the question whether monetary remedies are incidental "has more to do with the uniform character of the relief rather than with its label"). Finally, class counsel has carved up its cause of action, eschewing relief (emotional distress and punitive damages) that might be available to individual plaintiffs to increase the likelihood of class certification with its coercive pressure to settle. This tactic certainly benefits class counsel, but in *Ticor*, this Court

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[2] Plaintiffs' reliance on *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), is wholly inapt. Opp. 15. That case concerned backpay under Title VII of the Civil Rights Act of 1964, *see* 422 U.S. at 408-09, a remedy defined by the statute as "equitable." 42 U.S.C. § 2000e-5(g)(1). Indeed, *Great-West* not only rejects the analogy between backpay and equitable restitution, it also questions the equitable nature of backpay generally. *See* 534 U.S. at 218 n.4 ("Congress 'treated [backpay] as equitable' in Title VII only in the narrow sense that it allowed backpay to be awarded *together with* equitable relief") (citation omitted; alteration in original). As the Fifth Circuit explained, "[i]t would be mistaken to presume that because backpay – a remedy readily calculable on a classwide basis – is compatible with a rule 23(b)(2) class, any other remedy designated as equitable may automatically piggyback a claim for injunctive relief." App. 16a.

questioned whether it is appropriate to certify a (b)(2) mandatory class in these circumstances.

Second, plaintiffs assert that the Insurance Companies are bad actors who allegedly engaged in discrimination that had a class-wide impact. Opp. 12-13. Rule 23's requirements are not suspended in cases alleging discrimination. Ignoring both that the policies at issue have not been sold since at least "the early 1970's" and the vast adjustments the Insurance Companies have already made in the regulatory process, App. 5a, 56a-57a, plaintiffs essentially argue that the class should be certified because the Insurance Companies deserve to pay more than they already have paid. This argument is not relevant to whether this Court should hear the case.[3]

Third, plaintiffs assert that at least one million and potentially 4.5 million class members can benefit from injunctive relief. Opp. 13. Even accepting plaintiffs' incorrect characterization,[4] between one million and 4.5 million class members (20-82%) would receive *no* benefit from an injunction. *Id.* Petitioners submit that in such circumstances, as a matter of law, the monetary relief sought is not "incidental" and the class cannot be certified under (b)(2). The class must, at the very least, exclude plaintiffs

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[3] The Insurance Companies' liability is determined by the substantive law that applies; and the Companies have a due process right to have individualized defenses related to the damages amount and limitations addressed. The Companies seek to avoid an unlawful class certification that deprives them of due process and coerces them to "settle and . . . abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). *See also* Brief *Amicus Curiae* of ACLI at 12-16.

[4] This statement confuses "class members" with holders of industrial life policies. The experts disagreed on the *total* number of industrial life policies from the relevant period remaining in force, with the Insurance Companies' expert saying one million and plaintiffs' expert saying 4.5 million – but it is undisputed that this is the total number of industrial life policies, *not* the number allegedly affected by race-based pricing. *See* App. 5a.

seeking only money damages. This case thus starkly presents the critical question whether (b)(2) certification is lawful when a substantial percentage (potentially a majority) of the class receives only monetary relief.

Fourth, plaintiffs claim that class members seek only $300-$500, and thus have "negative value" claims. Opp. 3, 12. The dollar figures are new and unsupported by any citation. The negative-value claim ignores the law and practical realities. Individual plaintiffs here are entitled to seek not only compensatory damages, but also statutory attorneys' fees and punitive damages. See 42 U.S.C. § 1988(b) (attorneys' fees); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (punitive damages). The availability of such relief is critical to whether the claim has negative value. See *e.g.*, *Rutstein* v. *Avis Rent-A-Car, Sys., Inc.*, 211 F.3d 1228, 1241 n. 21 (11th Cir. 2000) (where "individual plaintiffs may be entitled to substantial compensatory and punitive damages should they prevail, the most compelling justification for a Rule 23(b)(3) class action – the possibility of negative value suits – is absent"); *Andrews* v. *AT&T Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995). Equally to the point, more than *2000* individual claims that have been filed in this multi-district litigation, belying any negative-value characterization. Finally, class counsel amputated whole categories of relief (damages for emotional distress and punitive damages) to create a case involving lower-value claims – conduct that should not be rewarded with (b)(2) certification.

Finally, plaintiffs agree that individual damages determinations are required, but insist that the information is available, that the criteria are objectively ascertainable, and that grids can be constructed that will allow the determination of damages. But the district court – the court that would have to handle these hearings – found:

> in order to correctly assess damages the Court would still have to consider: 1) the plaintiff's age at the time

> the policy was issued; 2) whether the policy had built in benefits, such as a loss of limb benefit; 3) whether the premium as calculated was race-neutral; and 4) whether any dividends were paid on any policies. . . . . There would need to be a determination of which policies had been adjusted, the amount of the adjustment and whether the adjustment was sufficient. All of this further illustrates the need to conduct personalized hearings that focus on the idiosyncrasies of each policy and each purchaser. [App. 56a-57a.]

Far from disputing that massive factual inquiries were necessary, the Fifth Circuit conceded that the case required complex damages determinations and depended on individual "idiosyncrasies" and numerous variables. The court believed that if the information existed (though not in evidence) and the numerous relevant variables were somehow objectively ascertainable, then it was legally irrelevant that potentially millions of individual inquiries were required to determine individual damages. App. 17a. To the contrary, the required damages inquiries establish, as a matter of law, that the money damages sought are not incidental to injunctive relief.[5]

Ironically, in arguing that the calculations are possible and manageable, plaintiffs rely on the Insurance Companies' massive adjustments to many industrial life policies. This reliance is utterly misplaced. It is undisputed that plaintiffs

---

[5] Other than falsely stating in their Opposition Brief (at 7) that none of the publications regarding race-based rates mentioned defendants by name (*but see* R. Doc. 367, App. D, tabs 31, 33, No. 02-30540 (5th Cir. filed July 2, 2002) (naming ANICO and Western-Southern), *and id.* tabs 31, 33, 37, 41, 42 (mentioning Monumental's acquired companies, Durham Life Insurance Co., Public Savings Life Co., Security Trust Life Insurance Co., and Kentucky Central Life Insurance Co.)), plaintiffs offer no response to the Insurance Companies' demonstration that they have a right to show that individual plaintiffs had actual or constructive knowledge of dual rates before the limitations periods governing these claims had run. Pet. 28-29.

are unsatisfied with the adjustments; thus, the adequacy of particular adjustments would have to be individually assessed. App. 57a. In addition, the only record evidence is that the Insurance Companies themselves were not always able to determine the race of policyholders or the other variables relevant to assessing which policies required adjustment so that the Companies had to make overbroad adjustments.[6] See also State of Md. Ins. Admin. et al., *Examination Report of the Life Business of the Monumental Life Insurance Company* 19 (2003), *available at* http;//www.mdinsurance.state.md.us./documents/monument-al/multi-state06-2-03.pdf ("it cannot be determined on an individual basis whether race was the sole factor, but a likelihood of discrimination on a plan code basis can be determined"); *id.* at 14 (the Company "adjusted the in-force business of various plan codes based on the likelihood that race was a factor, without knowing whether specific individuals were placed in a plan code based on race").

The question whether massive individual damages inquiries are legally consistent with Rule 23(b)(2) certification is directly presented by this case. The Court should grant certiorari and use this case as a vehicle to resolve the questions left open in *Ticor* – the availability and meaning of "incidental" damages under Rule 23(b)(2), and the relationship between (b)(2) and (b)(3) certification.

CONCLUSION

The petition for certiorari should be granted.

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[6] *See, e.g.*, Test. of Actuary Leonard Buckner regarding Providian (now part of Monumental) ("policies that we could either determine definitely had different rates based on race, or they had characteristics where you couldn't be sure but to be on the safe side, we assumed that they had been [based on race],") (R. Doc. 367, App. A. tab 7, at 37, No. 02-30540 (5th Cir. filed July 2, 2002); Test. of Carroll Hutchison (Western-Southern adjusted policies held by Caucasians because of the absence or incompleteness of records), *id.* tab 43 ¶ 11.

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In the Supreme Court of the United States

AMERICAN NATIONAL INSURANCE CO., MONUMENTAL LIFE INSURANCE CO., AND THE WESTERN & SOUTHERN LIFE INSURANCE CO.,

Petitioners,

v.

MATTIE BRATCHER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States (the Chamber) is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

Chamber members routinely are named as defendants in litigation in which plaintiffs seek class certification, including certification of injunctive-relief classes under Rule 23(b)(2). Because of its extensive experience in these matters, the Chamber is well situated to brief this Court on the importance of the issues, beyond the immediate concerns of the parties to the litigation, to companies collectively responsible for a substantial portion of total U.S. economic activity

The Chamber takes no position on the merits of the underlying action. But the Chamber emphatically agrees with petitioners that a grant of certiorari is needed to clear up the confusion over the proper standards for certifying a class under Fed. R. Civ. P. 23(b)(2). Beyond the intolerable confusion and

---

[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

inconsistency generated by the longstanding circuit split on this issue, the decision below rests on an incorrect and overly permissive view of the requirements for certifying a class under Rule 23(b)(2), and threatens to lead to the improper certification of classes in many cases.

The confusion and inconsistency in the cases threaten severe negative consequences for the Chamber's members and for the public. Class certification can transform a modest case into one with thousands or millions of claimants and billions of dollars in damages, while depriving defendants of the opportunity to expose the legal and factual shortcomings of individual claims for liability or damages. Improper class certifications generate overwhelming pressure on defendants to settle cases, *regardless of the merits*, because defendants simply cannot "bet the company" on a single jury verdict, even if they believe there is an overwhelming likelihood that they will win a trial on the merits. These concerns are exacerbated when certification is allowed under Rule 23(b)(2), because that provision does not contain the important procedural protections found in Rule 23(b)(3). For these reasons, the Chamber and its members have a strong interest in promoting adherence to the strict requirements of Rule 23. In any event, Chamber members need a consistent rule to enable them to order their behavior with full knowledge of the litigation risks.

STATEMENT

This case presents the Court with an excellent opportunity to decide a question that has generated substantial confusion in the circuits: What standards are to be applied when plaintiffs seek to certify class actions seeking both injunctive relief *and* damages? Fed. R. Civ. P. 23(b)(2) permits a class action if the defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final *injunctive* relief * * * with respect to the class as a whole" (emphasis added). Fed. R. Civ. P. 23(b)(3) permits damages class actions if careful analysis shows that class treatment is appropriate. The language of Rule 23(b) is clear on its face:

actions that do not meet the requirements of any of (b)(1), (b)(2), or (b)(3) are not permitted. However, one passage in the commentary to the 1966 amendments to Rule 23 has been invoked to justify an entire new category of class actions – actions seeking injunctive relief *and* money damages, in which "the appropriate final relief" does not "relate[] exclusively or predominantly to money damages." Fed. R. Civ. P. 23, Advisory Committee Notes.

In *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994), this Court considered the standards for certification under the injunction provision of the Rule – (b)(2) – of classes seeking monetary as well as injunctive relief. That case, however, presented only the constitutional question whether awarding money damages without requiring notice and an opportunity for class members to opt out of the litigation violated the due process rights of absent class members. *Id.* at 120-121. The Court dismissed the writ as improvidently granted, preferring to wait for an opportunity to "resolve the preliminary nonconstitutional question" – whether classes seeking money damages can be certified at all under Rule 23(b)(2), which does not provide an opt-out right – "before proceeding to the constitutional claim." *Id.* at 121. This Court still has not decided that issue. See *Jefferson* v. *Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999) ("It is an open question * * * in the Supreme Court * * * whether Rule 23(b)(2) *ever* may be used to certify a no-notice, no-opt-out class when compensatory or punitive damages are in issue.") (emphasis in original). By granting the petition in this case, the Court can decide the issue *Ticor Title* left unresolved.

A. Rule 23

Promulgated in 1937 and amended three times since – in 1966, 1988, and 2003 – Fed. R. Civ. P. 23 governs class actions in federal courts. Most pertinent to this case are the 1966 amendments, promulgated in response to the general belief that the rule needed reforming. See, *e.g.*, *Fox* v. *Glickman Corp.*, 355 F.2d 161, 162 (2d Cir. 1965) (Friendly, J.) (noting the "desirability of amending Rule[] 23"). Even immediately after

the amendments, however, it was noted that "[t]he Rule * * * tends to ask more questions than it answers." Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 39 (1967). This case demonstrates that Judge Frankel's observation remains true today.

Rule 23(b) defines the types of "Class Actions Maintainable." Two types are relevant here. First there is the 23(b)(2) class, which can be certified

> if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed. R. Civ. P. 23(b)(2). This type of class action was intended primarily for civil-rights lawsuits, "where a party is charged with discriminating unlawfully against a class." Fed. R. Civ. P. 23, Advisory Committee Notes. A class certified under Rule 23(b)(2) is a "mandatory" class action, because the rule "does not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 834 n.13 (1999) (discussing the 23(b)(1) "limited fund" class action).

Rule 23 also provides for certification of classes in which

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3). Like a 23(b)(2) class, a class certified under 23(b)(3) must satisfy the requirements of subdivision (a). In addition, Rule 23(b)(3) lists four non-exclusive "matters

pertinent to the findings" of predominance and superiority: (1) class members' interest in pursuing individual actions; (2) the extent of litigation already commenced by class members; (3) the desirability of hearing all the claims in one forum; and (4) the management difficulties for the class action. Fed. R. Civ. P. 23(b)(3)(A)-(D); see Advisory Committee Notes. If a class is certified under Rule 23(b)(3), "the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The notice must state the right of class members to opt out of the litigation. *Ibid.*[2]

The basic distinction between injunctive-relief classes under Rule 23(b)(2) and damages classes under Rule 23(b)(3) is plain enough on paper, but in practice the two categories have not been treated as mutually exclusive. See *Eubanks* v. *Billington*, 110 F.3d 87, 92-93 (D.C. Cir. 1997) (noting that classes may meet the requirements of certification under both provisions). Lower courts have held that individual compensatory relief may be available in 23(b)(2) actions, along with injunctive relief against classwide discrimination. See *id.* at 93 ("The Advisory Committee foresaw neither the surge in filings of Title VII class actions nor decisions that award individual compensatory relief based on findings of classwide discrimination.'") (quoting George Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 25 (1983)).

This Court repeatedly has noted the tension between the class action rule and absent class members' due process rights, which prevent a person from being "'bound by a judgment *in personam* in a litigation in which he is not designated a party or to which he has not been made a party by service of process.'"

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[2] Notice is permitted, but not required, in classes certified under Rule 23(b)(2), and the rule does not mention opt-out rights for (b)(2) classes. See Fed. R. Civ. P. 23(c)(2)(A); (d)(2).

Ortiz, 527 U.S. at 846 (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940)). For example, in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-812 & n.3 (1985), this Court noted the necessity of procedural protections to safeguard the due process rights of absent class members who have claims for monetary relief:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. * * * Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class * * *.

In *Ticor Title*, the Court granted certiorari on the question whether "'a federal court may refuse to enforce a prior federal class action judgment * * * on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf.'" 511 U.S. at 120-121 (quoting the petition). The Court noted that there was a substantial non-constitutional question whether Rule 23(b)(1) and Rule 23(b)(2) permitted classes seeking monetary relief at all. *Id.* at 121. If the rule were interpreted to preclude money damages, the due process issue presented by the petition would be avoided. *Ibid.* The Court therefore dismissed the writ as improvidently granted. *Id.* at 122.

Dissenting from the decision to dismiss the writ, three Justices noted that "the lower courts have consistently held that the presence of monetary damages does not preclude class certification under Rules 23(b)(1)(A) and (b)(2)," but added that the correctness of those decisions was "a question we need not * * * decide today." 511 U.S. at 124 (O'Connor, J., joined by Rehnquist, C.J.,and Kennedy, J.). The dissent pointed out that lower courts continued to certify classes seeking monetary relief under (b)(1) and (b)(2), and, "[u]nless and until a contrary rule is adopted, courts will continue to certify classes under Rules 23(b)(1) and 23(b)(2) notwithstanding the presence of damages claims." *Ibid.*

B. The Proceedings in This Case

This case is another implicating the "awkward mismatch between the subdivisions under which class actions are certified and the procedural protections to which a class is entitled." George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 260 (1996). Respondents represent a putative class of "[a]ll African Americans who own, or owned at the time of policy termination, an industrial life insurance policy that was issued as a substandard plan or at a substandard rate." Pet. App. 51a. Respondents sought certification of this class under Rule 23(b)(2), arguing that "they are primarily seeking equitable relief." *Ibid.* Nevertheless, respondents also seek "restitution of past premium overcharges or benefit underpayments." *Id.* at 54a.

1. The district court denied certification under Rule 23(b)(2), holding that "the request for relief is primarily and in actuality in the form of monetary relief." Pet. App. 55a. This is because only some plaintiffs could realize a benefit from injunctive relief; "the defendants no longer sell so-called industrial life insurance." *Ibid.* The injunctive relief sought by respondents was therefore "'designed primarily to facilitate and ensure the satisfaction of any monetary relief the Court might award.'" *Id.* at 56a (quoting *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 193 F.R.D. 505, 509 (W.D. Mich. 2000)). "[M]any * * * proposed class members * * * would not benefit in any way from the injunctive relief requested, and thus, the request for declaratory relief only serves to bootstrap a more genuine interest in an award of monetary damages." *Id.* at 54a. The district court held that, because monetary relief predominated over injunctive relief, certification under 23(b)(2) was improper.

In addition to holding that the proposed class failed the predominance test for 23(b)(2) certification, the district court noted that the class was not adequately cohesive for certification under that provision. Pet. App. 56a. It noted the existence of some

280 different insurance companies that had issued policies now administered by the three defendants. "[A]ll had different underwriting and pricing procedures, involving perhaps a million policy holders." *Ibid.* Other potential disparities included (*id.* at 56a-57a):

> 1) the plaintiff's age at the time the policy was issued; 2) whether the policy had built in benefits, such as a loss of limb benefit; 3) whether the premium as calculated was race-neutral; and 4) whether any dividends were paid on any policies. The Court would also have to consider the policies that had lapsed or that had been adjusted by defendants. There would need to be a determination of which policies had been adjusted, the amount of the adjustment and whether the adjustment was sufficient.

Additionally, defendants argued the possibility of a statute-of-limitations defense that would vary from plaintiff to plaintiff, based in part on the application of notice rules. *Id.* at 57a-58a.

2. The Fifth Circuit reversed over a dissent by Judge Clement. A petition for rehearing was denied, and the panel issued a revised opinion, with Judge Clement again dissenting. The court noted the primary factual dispute over what percentage of the possible class members was seeking injunctive, versus monetary, relief. Because "as early as 1988[] some insurers voluntarily adjusted premiums and/or death benefits to equalize the amount of coverage per premium dollar," and because "[i]t is undisputed that all companies that sold dual rate or dual plan policies have not done so since the early 1970's" (Pet. App. 5a), many purported class members could gain nothing from injunctive relief (which might, for example, order equitable adjustment of any existing policies). In fact, "[d]efendants' expert estimates that the ratio of terminated policies to outstanding policies is approximately five to one, meaning that slightly more than one million policies remain in force." *Ibid.* Plaintiffs' expert testified differently: "over 4.5 million of the 5.6 million industrial policies issued by defendants remain in-force." *Ibid.*

The panel majority held that "'determining whether one form of relief actually predominates in some quantifiable sense is a wasteful and impossible task that should be avoided.'" Pet. App. 10a (quoting *Allison* v. *Citgo Petrol. Co.*, 151 F.3d 402 (5th Cir. 1998)).[3] Instead, although the court noted that monetary relief is essentially individual in nature (Pet. App. 11a ("[o]nce monetary damages enter the picture, however, class cohesiveness is generally lost")), it held that whether monetary relief was the "prime goal" was irrelevant to the (b)(2) certification analysis. *Id.* at 10a. In so holding, the court noted the direct split with the Second and Ninth Circuits, both of which condition (b)(2) certification on the "intent of the plaintiffs in bringing suit." *Molski* v. *Gleich*, 318 F.3d 937, 950 (9th Cir. 2003); see *Robinson* v. *Metro-North Commuter R.R.*, 267 F.3d 147, 163-164 (2d Cir. 2001). The court then held – citing plaintiffs' 4.5 million figure[4] – that "the proportion" "of class members continuing to pay discriminatory premiums * * * is sufficient" to deem the class to be seeking injunctive relief. Pet. App. 12a.

The majority then addressed the question of notice and opt-out, which some courts have held are permitted, but not required, when a class is certified under Rule 23(b)(2). See pp.

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[3] The holding below already has been interpreted to mean that a court should not conduct a predominance analysis when faced with a request for certification under 23(b)(2) of a class seeking both injunctive relief and money damages. See *Corley* v. *Entergy Corp.*, — F.R.D. —, 2004 WL 1443896, at *6 n.9 (E.D. Tex. Jan. 27, 2004) (holding that a predominance analysis is unnecessary and citing the Fifth Circuit decision in this case).

[4] If the panel majority thought itself bound to accept plaintiffs' allegations and expert testimony at the class certification stage, it placed itself in conflict with a line of cases from other circuits exemplified by *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (certifying a class without resolving a "clash" between each side's experts "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert").

4-5, *supra*; *Eubanks*, 110 F.3d at 94 (district courts have discretion to grant opt-out rights for (b)(2) classes). But see note 8, *infra*. In this case, the court held that "class members must be provided adequate notice" if the class was certified, and "the district court should consider the possibility of opt-out rights." Pet. App. 13a. To justify that holding, the court noted that "the rule 23(b)(2) predominance requirement, by focusing on uniform relief flowing from defendants' liability, 'serves essentially the same functions as the procedural safeguards and efficiency and manageability standards mandated in (b)(3) class actions.'" *Id.* at 14a (quoting *Allison*, 151 F.3d at 414-415).

Finally, the panel majority discussed the complications of calculating the individualized monetary damages, which are distinct from backpay the court understood to be designated by Title VII as equitable in nature,[5] and the possibility that the statute-of-limitations defenses differed from plaintiff to plaintiff. It concluded that calculation of damages would be "'a mechanical task,'" and that questions concerning constructive notice that might trigger the statute of limitations could be determined on a nationwide and classwide basis. Pet. App. 15a-21a.

Judge Clement argued in dissent that the majority ignored the applicable standards of review. Pet. App. 22a-24a. She noted that the district court's determination that monetary relief predominated over injunctive relief was a factual finding. "In setting aside these factual findings, the majority fails to show that the district court has committed clear error." *Id.* at 22a.

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[5] But cf. *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 218 n.4 (2002) ("Congress 'treated backpay as equitable' in Title VII only in the narrow sense that it allowed backpay to be awarded *together with* equitable relief * * *.") (citation omitted; emphasis in original).

SUMMARY OF THE ARGUMENT

The holding of the Fifth Circuit below is in conflict with other courts of appeals on two distinct grounds, both of which are encompassed within the question presented by the petition for certiorari. The first conflict concerns the application of the standard described in the Advisory Committee Notes to Rule 23(b)(2) requiring that the appropriate final relief not relate "exclusively or predominantly" to money damages. Although the district court had held that the primary motivation of the plaintiffs in bringing suit was money damages – which likely would defeat certification in the Second and Ninth Circuits – the court of appeals held that plaintiffs' motivation was irrelevant. The court also held that opt-out rights are discretionary when a class is certified under Rule 23(b)(2). This holding conflicts with decisions of other courts, holding that Rule 23(b)(2) does not permit class members to opt out.

The implications of overuse of the 23(b)(2) certification provision are significant. Class actions are already exceptionally – in our view excessively – powerful weapons for plaintiffs and their counsel. They become even more so when the procedural protections that govern damages class actions under Rule 23(b)(3) are ignored by certifying instead under (b)(2). If the availability of Rule 23(b)(2) certification is to be expanded so significantly, the decision should be made by this Court, and not by the courts of appeals. In any event, the rule must be applied consistently nationwide.

The question of an opt-out right in damages actions brought under (b)(2), which was arguably present in *Ticor Title*, but which the Court decided was not squarely presented, raises substantial due process concerns for absent class members. It also raises important concerns of repose – the most important benefit of Rule 23(b)(2) class actions, according to Judge Friendly – for defendants, because of the risk that a settlement or verdict may be attacked collaterally by absent class members who claim that their due process rights were ignored (as did the *Ticor Title*

respondents). This case presents the Court with the opportunity to clarify this important issue.

The decision below also is wrong. It operates to liberalize the standard for certifying classes seeking money damages under Rule 23(b)(2) to a degree that cannot be squared with the rule itself. Review by this Court is needed to correct that important error on a frequently recurring issue, cleanly presented in this case.

ARGUMENT

I. The Decision Below Adds To the Conflict and Confusion in the Circuits Over the Permissible Use of Rule 23(b)(2) to Certify Classes Seeking Money Damages in Addition to Injunctive Relief

A. A deep and entrenched conflict has developed in the circuits over the application of Rule 23(b)(2) in cases such as this one, where plaintiffs seek monetary damages in 23(b)(2) class actions. This conflict has produced, and continues to produce, substantial confusion, and calls for resolution by this Court. The split among the circuits, with at least two different rules for treatment of these hybrid class actions, is detailed in the petition. Pet. 14-20. On one side of the conflict are the courts holding that the subjective motivation of plaintiffs seeking certification – whether they are actually seeking injunctive or monetary relief – should be analyzed to determine whether monetary relief predominates over injunctive relief. See *Molski*, 318 F.3d at 950; *Robinson*, 267 F.3d at 163-164. Judges in those circuits have recognized the conflict. See *Parker* v. *Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 23 (2d Cir. 2003) (Newman, J., concurring) ("this Court has rejected the Fifth Circuit's limitation of (b)(2) to claims for 'incidental' damages, * * * outlining instead a broader 'ad hoc' approach"); *Molski*, 318 F.3d at 949 ("we refuse to adopt the approach set forth in *Allison*").

Markedly different in approach are the courts that have followed the *Allison* test, which states that "monetary relief predominates in (b)(2) class actions unless it is incidental to

requested" equitable relief, and defines "incidental" by asking whether the damages "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison*, 151 F.3d at 415 (emphasis in original). At least the Sixth, Seventh, and Eleventh Circuits have joined the Fifth Circuit on this side of the basic conflict. See *Coleman* v. *General Motors Acceptance Corp.*, 296 F.3d 443, 446-447 (6th Cir. 2002); *Jefferson*, 195 F.3d at 898 (adopting a narrow "incidental to the equitable remedy" approach to certification of class actions seeking monetary relief); *Lemon* v. *Int'l Union of Operating Eng'rs*, 216 F.3d 577, 579 (7th Cir. 2000) (reversing (b)(2) certification because monetary relief was not incidental); *Murray* v. *Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) ("incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions"). One panel of the Third Circuit has followed the *Allison* approach as well in an unpublished opinion. See *Barabin* v. *Aramark Corp.*, No. 02-8057, 2003 WL 355417, at *2 (3d Cir. Jan. 24, 2003) (adopting the *Allison* test for predominance, but also citing *Molski* and *Robinson* favorably).

Though the motivation test of the Second and Ninth Circuits is often more favorable to plaintiffs seeking (b)(2) class certification than is the *Allison* test, in this case the opposite is true: both the district court and the court of appeals accepted that the plaintiffs were more interested in monetary relief than in injunctive relief – so in the Ninth and Second Circuits, the plaintiffs in this case seemingly could *not* have obtained certification under Rule 23(b)(2). In addition, as the application of the *Allison* test by the panel majority below indicates, that test is itself manipulable: a true focus on whether the monetary relief sought is *incidental* – the part of the test the Seventh Circuit emphasizes – would surely have resulted in affirmance of the district court's denial of class certification, but the panel majority was able to reverse by focusing instead on the *Allison* panel's redefinition of the word "incidental" to mean "flow[ing] directly from liability to the class *as a whole* on the claims

forming the basis of the injunctive or declaratory relief." Pet. App. 15a-16a. By granting review in this case and reversing under *either* the Second/Ninth Circuit test emphasizing motivation or the Seventh Circuit test emphasizing the incidental nature of monetary relief, this Court could greatly improve the clarity and uniformity of the law nationwide, while also confining Rule 23(b)(2) more closely to its intended purpose.

B. In addition to the confusion on the appropriate standard for certification of class actions seeking both monetary and injunctive relief under 23(b)(2), this case presents the Court with an excellent opportunity to clarify the confusion over class members' right to opt out of classes certified under (b)(2). In 1983, the court in *Holmes* v. *Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), recognized the existence of a circuit split on the question of opt-out rights, which "reflect[s] a tension between the policy of facilitating antidiscrimination class actions and the need to protect the rights of absent class members." *Id.* at 1153 (citing cases); see also *Plummer* v. *Chem. Bank*, 668 F.2d 654, 657 n.2 (2d Cir. 1982) (citing cases). The *Holmes* court also noted: "the United States Supreme Court has not yet decided whether opting out of (b)(2) classes is ever permissible." 706 F.2d at 1153. Despite having touched on it three times (in *Ortiz*, 527 U.S. at 844-848, *Ticor Title*, 511 U.S. at 121, and *Shutts*, 472 U.S. at 811-812), this Court still has not decided that question.

In this case, the court of appeals held that "the district court should consider the possibility of opt-out rights." Pet. App. 13a. However, while mandating notice to absent class members under Rule 23(d)(2), the court treated opt-out rights as discretionary, although even by the court of appeals' count, between one and 4.5 million class members could realize *only* monetary relief. See pp. 8-9, *supra*. The Seventh Circuit appears to follow a very similar approach. *Lemon*, 216 F.3d at 582 (discussing the district court's "plenary authority under Rules 23(d)(2) and 23(d)(5) to provide all class members with personal notice and opportunity to opt out"). The Sixth Circuit

has stated a highly permissive standard – recommending that a district court certify a class under (b)(2) rather than (b)(3) *specifically because of* the lack of an opt-out requirement in the rule. See *Laskey* v. *Int'l Union*, 638 F.2d 954, 956-957 (6th Cir. 1981).

The Ninth Circuit, by contrast, recently has taken a harder line, holding that opt-out rights must be made available "when substantial monetary damages are involved." *Molski*, 318 F.3d at 948. It is, of course, no answer to the due process concern that some – but not all – of the circuits require the opportunity to opt out of a (b)(2) class. This case presents the Court with the opportunity to address the substantial due process question left unresolved in *Ticor Title*. See Pet. 18-20. The Court may wish to consider that constitutional question either in the course of interpreting the Rule so that it may apply the doctrine of constitutional avoidance (see *Ortiz*, 527 U.S. at 845), or in dictating further proceedings if the Court first concludes that Rule 23(b)(2) does permit class actions seeking monetary relief. Either way, a grant of certiorari in this case would present the opportunity to give much-needed guidance to the lower courts on an important matter with respect to which those courts are reaching starkly inconsistent results.

II. The Confusion Over These Issues, and the Overly Permissive Use of Rule 23(b)(2) Certification, Have Substantial and Recurring Implications for Litigants

A. The 1966 amendments to Rule 23 "greatly augmented the volume of private litigation" through the "expanded concept of the class action." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 118 (1973). Judge Friendly "perceived few grounds for serious criticism of Rule 23(b)(2)" because "[t]he relief sought is generally an injunction or decree." *Ibid.* Indeed, if *injunctive* relief is sought, Judge Friendly viewed the primary benefit of a (b)(2) class action as being the "benefit [to a] successful defendant in preventing further litigation," because

an injunction – in practical effect, if not in legal reality – operates to the benefit of parties not before the court. *Ibid.*

Judge Friendly did not express such positive sentiments with regard to classes certified under Rule 23(b)(3), "what would have been a 'spurious' class action." FRIENDLY, FEDERAL JURISDICTION, *supra*, at 119. The evils attendant upon careless certification of class actions have been much discussed and are well documented. The cost of litigating large class actions and the risk of catastrophic damages in the event of a loss create irresistible pressures on defendants to settle, even when they have meritorious defenses or the plaintiffs' claims are weak. See *id.* at 119-120. This Court has recognized that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). The larger the class, the greater the pressure on defendants, such that, when vast numbers of claims are aggregated, "settlement becomes almost inevitable – and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig*, 288 F.3d 1012, 1016 (7th Cir. 2002). Judge Friendly described this phenomenon as the "blackmail settlement." FRIENDLY, FEDERAL JURISDICTION, *supra*, at 120.

Although sanguine about injunctive relief class actions, Judge Friendly was highly skeptical of the device as a means of gathering a multitude of *de minimis* monetary claims – essentially what the court below termed the "negative value class action." Pet. App. 3a. "Something seems to have gone radically wrong with a well-intentioned effort * * *. This is a matter that needs urgent attention." FRIENDLY, FEDERAL JURISDICTION, *supra*, at 120.

B. Writing in 1973, Judge Friendly did not have occasion to remark on the phenomenon illustrated by this case – damages actions certified under the more permissive standards that gov-

ern actions for injunctive relief, 23(b)(2). The opportunities for abuse in 23(b)(3) class actions seeking predominantly money damages are magnified when classes seeking damages are certified under 23(b)(2). As this Court has noted, "the limitations on class sizes associated with 23(b)(3) actions do not apply" to classes certified under 23(b)(2). *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). "Nor is a nationwide class" certified under 23(b)(2) "inconsistent with principles of equity jurisprudence." *Ibid.* Furthermore, the stringent procedures that must be followed to certify a class under 23(b)(3) provide some check on abuse of *that* procedure, but are not present when the class is certified under 23(b)(2). See pp. 4-5, *supra*. "These procedural protections are considered unnecessary for a Rule 23(b)(2) class because its requirements are designed to permit only classes with homogenous interests." *Coleman*, 296 F.3d at 447 (citing *Holmes*, 706 F.2d at 1155-1156).

The inevitable consequence of the approach followed by the panel majority below would be the certification of much larger damages classes than is possible if courts respect the distinction between 23(b)(2) and 23(b)(3). Judge Friendly gave one example that he specifically decried – a six-million-member Rule 23(b)(3) class in which each class member stood to recover less than $4. FRIENDLY, FEDERAL JURISDICTION, *supra*, at 119 (citing *Eisen* v. *Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971)). But, because it was certified under 23(b)(3), that class at least was subjected to considerations of predominance and superiority before it was certified. In the case before the Court, almost precisely the same situation is presented: a million-plus-member class, in which each member stands to recover a very small dollar amount, was held to be properly certifiable. See Pet. App. 51a-52a n.1; *id.* at 3a & n.1. But in this case, because certification is sought under Rule 23(b)(2), the important checks of common issues predominating over individual issues and superiority of the class action device – as well as the require-

ment of notice to absent class members and right to opt out of the class – are not present.[6]

C. Certifications of classes seeking money damages under Rule 23(b)(2) present the risk of substantially prejudicing class-action defendants. Absent class members will seek to relitigate settlements or verdicts if they find them unfavorable. Defendants will be unable to rely on the finality usually offered by the class-action device, because of the risk that absent class members will claim that it is a violation of due process to foreclose their right to individual suits. See *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (refusing to bind an absent class member to the *res judicata* effect of a class settlement), cert. dismissed, 511 U.S. 117 (1994).

In *Smith* v. *Swormstedt*, 16 How. 288 (1853), in an opinion written by Justice Story – "credited with having formulated the standards [for class actions] in this country" (7A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1751, at 10 (1986)) – this Court held that "the decree binds all [class members] the same as if all were before the court." 16 How. at 303. In *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356, 367 (1921), this Court held that "[i]f the decree is to be effective and conflicting judgments are to be avoided, all of the class must be concluded by the decree." And, as noted above, Judge Friendly saw repose as the primary benefit of the equitable class action under Rule 23(b)(2). See pp. 15-16, *supra*. This most important policy of repose will be undermined if courts certify damages class actions under Rule 23(b)(2).

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[6] The panel majority below noted other factors that increased its flexibility in the (b)(2) context. "'Where the class action seeks only injunctive or declaratory relief for which the notice provision of Fed. R. Civ. P. 23(c)(2) is not mandatory, the district court has even greater freedom in both the timing and specificity of its class definition.'" Pet. App. 6a n.6 (quoting *Battle* v. *Pennsylvania*, 629 F.2d 269, 271 n.1 (3d Cir. 1980). Also, "'[t]he precise definition of the (b)(2) class is relatively unimportant.'" Pet. App. 6a n.6 (quoting *Rice* v. *City of Philadelphia*, 66 F.R.D. 17, 19 (E.D. Pa. 1974)).

III. The Decision Below Is Wrong

The decision below is indefensible in light of the plain language of Rule 23(b)(2), as well as the policies underlying the rule and this Court's few pronouncements on its effect.[7] Rule 23(b)(2) is plain on its face, and applies to injunctive relief class actions: "thereby making appropriate *final injunctive relief* or *corresponding declaratory relief* with respect to the class as a whole" (emphasis added). The court of appeals below characterized such an interpretation – which would require certification of the highly individualized claims for money damages in this case, if certification could be had at all, under Rule 23(b)(3) – as "elevat[ing] form over substance." Pet. App. 14a. Respectfully, that is not so. As the preceding discussion indicates (pp. 15a-19a, *supra*), the formal distinctions between (b)(2) and (b)(3) classes exist to protect important substantive goals. As one judge recently noted (*Parker*, 331 F.3d at 24 (Newman, J., concurring) (quoting Fed. R. Civ. P. 23(b)(3)):

> I question whether we risk unduly extending (b)(2) in cases with monetary claims by inviting district judges to use it and then protect claimants with individualized damage amounts either by affording them opt-out rights or certifying only the liability issue. Such devices strike me as a way of undermining the (b)(3) requirement that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

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[7] This case implicates an additional question whether class representatives who may or may not have damages claims properly can represent those class members who do have such claims. While this Court has recognized representative standing in the context of claims for injunctive relief, in damages claims, a party who has suffered no monetary injury cannot sue on behalf of a party that has. See *Warth* v. *Seldin*, 422 U.S. 490, 515 (1975) (comparing associational standing in injunctive relief cases to classes certified under Rule 23(b)(2)). See also *Ortiz*, 527 U.S. at 830-831 (Rule 23 "'must be interpreted in keeping with Article III constraints'") (quoting *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 612-613 (1997)).

In addition, this Court's authorities make clear that, as a matter of due process, opt-out rights must be made available to absent class members seeking money damages. See, *e.g.*, *Ortiz*, 527 U.S. at 848. The court of appeals below held that opt-out rights were *discretionary* (Pet. App. 13a) – thus permitting the certification of a damages class action that could bind millions of absent class members to a one-size-fits-all award that may not properly reflect differences among their claims. The error will not be cured simply by requiring opt-out rights in this case.[8] Instead, the rule's failure to make opt-out mandatory for (b)(2) classes, as it does for (b)(3) classes, should be interpreted to preclude the use of (b)(2) certification for classes seeking damages that are not truly incidental (for example, as defined by the Seventh Circuit in *Jefferson*, 195 F.3d at 898).

* * * * *

Chief Justice Burger, writing for the Court, noted the "potential for misuse of the class action mechanism," under which the "benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries." *Deposit Guar Nat'l. Bank* v. *Roper*, 445 U.S. 326, 339 (1980). That problem, and the continuing confusion created by persistent circuit splits, can be addressed in this case by resolving the question that the Court could not reach in *Ticor Title*, but that is squarely presented for review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] Indeed, it is not clear that opt-out rights are *permitted* in a class certified under Rule 23(b)(2). Rule 23 discusses only discretionary notice requirements and permissive intervention. See Fed. R. Civ. P. 23(c)(2)(A), (d)(2). Permitting plaintiffs to opt out of (b)(2) classes would undermine what Judge Friendly viewed as the primary benefit of that form of certification. See pp. 15-16, *supra*.

Respectfully submitted.

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In the Supreme Court of the United States

AMERICAN NATIONAL INSURANCE COMPANY, MONUMENTAL LIFE INSURANCE COMPANY, AND THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY,

Petitioners,

v.

MATTIE BRATCHER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The American Council of Life Insurers ("ACLI") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari. All parties have consented to the filing of this brief. The required letters of consent have been filed with the Clerk of the Court.[1]

INTEREST OF THE *AMICUS CURIAE*

ACLI is the largest life insurance trade association in the United States. ACLI's members account for 69% of the life insurance premiums and 76% of the annuity considerations in the United States among legal reserve life insurance companies. A number of ACLI's members, including all three petitioners in this action, are defendants in putative class-action suits around the country alleging discrimination against African-Americans in the sale of small-face-amount, or "industrial," life-insurance policies. ACLI and its members are concerned that, unless reversed by this Court, the decision of the Fifth Circuit in this case will encourage the growing practice among class-action lawyers of seeking certification under Rule 23(b)(2) in order to circumvent the predominance and superiority requirements of Rule 23(b)(3).

SUMMARY OF ARGUMENT

In *Ticor Title Insurance Co.* v. *Brown*, 511 U.S. 117 (1994), this Court expressed substantial doubt that claims for monetary damages may ever be certified for class-wide adjudication under Rule 23(b)(2) of the Federal Rules of Civil Procedure, which permits class certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No other entity or person, aside from *amicus* ACLI, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief.

respect to the class as a whole." Because this Court has not yet ruled definitively on that question, however, the lower federal courts uniformly have adhered to the suggestion of the Rules Advisory Committee that monetary damages may be sought in a (b)(2) class action so long as they are not the "exclusive[] or predominant[]" form of relief requested by the class. Fed. R. Civ. P. 23(b)(2), Advisory Committee Note. In the instant case, however, the Fifth Circuit turned this "predominance" test on its head, holding that the monetary damages sought on behalf of each of millions of putative class members did not predominate despite the district court's unassailed finding that "many" of the putative class members (Pet. App. 9a) — as many as 82% (see *id.* at 12a) — would not benefit from the injunctive relief sought, and despite the panel majority's acknowledgment that the defendants' liability for damages to each class member would depend on the "idiosyncracies" of each class member's situation (*id.* at 16a).

In so holding, the Fifth Circuit read out of the Rule 23(b)(2) analysis the express requirement that the injunctive relief sought in a (b)(2) class action must effect a remedy applicable to the class "***as a whole***." Fed. R. Civ. P. 23(b)(2) (emphasis added). By holding instead that a class may be certified under Rule 23(b)(2) so long as some non-negligible number of the class members might benefit from injunctive relief (see Pet. App. 12a), the Fifth Circuit's decision throws open the door to abuse of the (b)(2) class action by enterprising class-action lawyers who wish to seek substantial monetary recoveries without having to satisfy the stringent requirements for certifying such cases as class actions under Rule 23(b)(3). Specifically, the decision of the Fifth Circuit invites class-action lawyers to reformulate as (b)(2) class actions suits that seek predominantly monetary damages through the simple expedient of adding to their complaints little more than a *pro forma* request for injunctive or declaratory relief.

Moreover, the class-action procedure approved by the Fifth Circuit endangers the due process rights of defendants and absent plaintiffs alike by relieving plaintiffs of their burden of proving the individualized elements of their claims, by depriving defendants of their right to put on individualized defenses, and by depriving absent class members of their right to seek individual relief when monetary damages are involved, while subjecting absent class members to the risk that a defense applicable only to some of them will be applied on a class-wide basis to preclude their claims. For all of these reasons, as well for the reasons stated in the petition, the Court should grant certiorari and reverse the decision below.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION THROWS OPEN THE DOOR TO ABUSE OF RULE 23(b)(2) CLASS ACTIONS

This Court has emphasized that it is "of overriding importance" that courts "be mindful that * * * Rule [23] as now composed sets the requirements they are bound to enforce," and that "[t]he text of a rule * * * limits judicial inventiveness." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997). The decision of the Fifth Circuit panel majority in this case contravenes that direction by effectively "amend[ing] [Rule 23(b)(2)] outside the process Congress ordered" (*ibid.*), thereby opening the door to the certification of class actions under Rule 23(b)(2) that are alien to the plain language of the Rule, the intent of its drafters, and the decisions of this Court.

The plain language of Rule 23(b)(2) directs that a class action may be certified thereunder only when the defendant's alleged wrongdoing "mak[es] appropriate final injunctive relief or corresponding declaratory relief with respect to the class ***as a whole***" (emphasis added). Thus, even assuming that monetary relief may be sought by a (b)(2) class in some

circumstances, the plain language of the Rule makes it clear that the first step in evaluating the propriety of certifying a (b)(2) class action is to determine whether the putative class is seeking injunctive or corresponding declaratory relief that will benefit all of its members. See Fed. R. Civ. P. 23(b)(2), Advisory Committee Note (explaining that a Rule 23(b)(2) class action applies to cases in which "final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class ***as a whole***, is appropriate") (emphasis added).[2] Only if the requested injunctive or corresponding declaratory relief would benefit the class as a whole does a court need to consider the impact that a request for monetary damages should have on the propriety of certifying a class under Rule 23(b)(2).

In the instant case, however, the panel majority treated the injunctive component of a (b)(2) class action as nothing more than a readily satisfied *pro forma* requirement, thereby paving the way for the certification under Rule 23(b)(2) of classes seeking substantial, indeed predominantly, money damages. In so doing, the panel majority not only failed in its obligation to enforce Rule 23(b)(2) as written, but under-

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[2] "Declaratory relief 'corresponds' to injunctive relief if, as a practical matter, a declaratory judgment provides the same relief that an injunction would, or if the declaratory relief leads to the subsequent entry of an injunction." 5 James Wm. Moore, *Moore's Federal Practice* § 23.43[3][a], at 23-197 (3d ed. 2004). A declaration of illegality that merely leads to an award of monetary damages does not, however, satisfy the requirements of Rule 23(b)(2). See *id.*, § 23.43[3][d], at 23-202 ("[C]ourts have held that actions seeking declaratory judgments under Rule 23(b)(2) are improper if the declaration is a declaration of liability that is not designed primarily to control the conduct of the parties, but rather is designed to form the basis for one or more subsequent monetary damage awards.").

took just the sort of "judicial inventiveness" against which this Court spoke in *Amchem*. 521 U.S. at 620.

As the panel majority acknowledged, the district court denied class certification because, *inter alia*, it found that "'many' proposed class members — those whose policies have lapsed, those whose policies have already been voluntarily adjusted by defendants, and those whose death benefits already have been paid — would not benefit from injunctive relief." Pet. App. 9a. The result, the district court ruled, was that the monetary relief sought by plaintiffs on behalf of the entire class necessarily predominated over their requested injunctive relief, thereby barring certification of the proposed class under Rule 23(b)(2). See *id.* at 9a-10a.

The panel majority reversed that ruling, not because it disagreed with the district court's factual finding that many putative class members would not benefit at all from the requested injunctive relief, but because it concluded that Rule 23(b)(2) requires only that some unspecified "proportion" of the class might benefit from an injunction. Pet. App. 12a. Indeed, the panel majority held that, even if only 18% of the class would benefit from injunctive relief, "th[at] proportion is sufficient" to deem "the class ***as a whole*** * * * to be seeking injunctive relief." *Ibid.* (emphasis added). The panel majority further held that, assuming that some non-negligible "proportion" of the class members will benefit from injunctive relief, the ***entire class*** is free to seek monetary relief in a (b)(2) class action. *Ibid.* That holding, which treats the injunctive component of a (b)(2) class action as a mere formality, cannot be reconciled with the plain language of Rule 23(b)(2).

Nor can it be reconciled with this Court's recognition in *Amchem* that Rule 23(b)(3) — not Rule 23(b)(2) — was intended by the drafters of Rule 23(b) to be the vehicle for resolving on a class-wide basis "complex litigation * * * for damages" such as the instant case. 521 U.S. at 614. Because

the drafters of the Rule recognized that actions for money damages might lack "the class cohesion that legitimizes representative action in the first place" (*id.* at 623), they imposed certain preconditions on the certification of such classes. Most notably, a Rule 23(b)(3) class action can be certified only if the district court first finds that common questions "'predominate over any questions affecting only individual [class] members,'" and that class resolution is "'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Id.* at 615 (quoting Fed. R. Civ. P. 23(b)(3)). By contrast, classes certified under Rule 23(b)(2) are ***presumed*** to enjoy cohesiveness and a commonality of interest, because such class actions seek to impose uniform group remedies for a uniform group injury in the form of class-wide injunctive or declaratory relief, thereby obviating the need for the additional procedural protections provided to (b)(3) classes. See Rule 23(b)(2), Advisory Committee Note (explaining that "[a]ction or inaction is directed to a class within the meaning of [Rule 23(b)(2)] * * * provided it is based on grounds which have general application to the class"); see also 5 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §16:17, at 214 (4th ed. 2002) ("[t]he theory underlying the less stringent notice requirements" for Rule 23(b)(2) class actions "is that in Rule 23(b)(2) actions there is purportedly a higher degree of 'cohesiveness or unity in the class' than in Rule 23(b)(3) class actions") (quoting Rule 23, Advisory Committee Note, 39 F.R.D. 69, 106).

Under the panel majority's formulation of the (b)(2) analysis, the critical ingredient that imbues the (b)(2) class with the homogeneity and cohesiveness that are its defining elements — namely, wrongdoing generally applicable to the class which can be rectified through class-wide injunctive or declaratory relief — is absent. What remains is a large-scale, complex suit for money damages that should be evaluated for certification only under the more stringent predominance and superiority requirements of Rule 23(b)(3). The panel major-

ity plainly was untroubled by this result, however, declaring that "to deny certification on the basis that the damages claims would be better brought as a rule 23(b)(3) class serves no function other than to elevate form over substance." Pet. App. 14a; see also *id.* at 14a n.16 ("Rule 23(b)(2) was adopted to facilitate the use of injunctive relief, not to compartmentalize claims for damages under Rule 23(b)(3)."). To the contrary, the panel majority's holding effectively eliminates the "line" that this Court has explained was carefully drawn by the drafters of Rule 23(b) to distinguish class actions that can be certified under Rule 23(b)(1) and (b)(2) from those that can be certified only under Rule 23(b)(3). *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 864 (1999) (citing *Amchem*).

Because just about any putative class will include at least some members who continue to suffer from the allegedly unlawful behavior, the panel majority's decision, if not reversed, will encourage enterprising class-action lawyers to use a request for injunctive relief as a Trojan horse with which to smuggle in, under the more lenient standards of Rule 23(b)(2), what is in actuality a multitude of individualized claims for money damages.

Importantly, the damage done by the panel majority's decision has ramifications well beyond the Fifth Circuit and cases involving race-based premiums. As the petition indicates, the majority of the circuits that have addressed the question whether monetary relief may be recovered in a (b)(2) class action has adopted the Fifth Circuit's test for evaluating whether the monetary relief sought by the putative (b)(2) class predominates over the injunctive relief requested. See Pet. 15. Accordingly, the panel majority's (b)(2) analysis potentially could become the dominant approach to determining the circumstances under which a district court may certify a (b)(2) class seeking substantial monetary relief. This would further aggravate the already extant split among

the circuits as to when, if ever, monetary relief may be sought by a (b)(2) class. See Pet. 14-20.

Several recently-filed suits confirm that this is no mere hypothetical concern: The floodgates having been opened, class-action lawyers already have begun routinely characterizing money damage claims as ones for "restitution," "disgorgement," "unjust enrichment," or "constructive trust," and adding on a claim for injunctive relief for good measure, in the hope of obtaining under the guise of Rule 23(b)(2) what they could not hope to obtain under Rule 23(b)(3) — certification of an expansive class and with it the prospect of a lucrative settlement.

1. *Central Alabama Comprehensive Healthcare, Inc.* v. *Aventis Pharmaceutical, Inc.*, No. 3:04CV673-B (M.D. Ala.) (filed July 13, 2004). Plaintiff seeks certification of a nationwide class of community health centers, public hospitals, and other entities that provide prescription drugs to the needy. Plaintiff alleges that the nine named defendants — each a major manufacturer of pharmaceuticals — charged the members of the putative class prices that were not discounted in the manner required by Section 340B of the Public Health Service Act, 42 U.S.C. § 256b. As a result, plaintiff contends, the putative class members "overpaid for prescription drugs by nearly $500 million per year," and perhaps as much as "$259 million per month," over a class period extending back twelve years, to 1992. Complaint ¶¶ 4, 50, 56.

Plaintiff argues that class certification would be proper under any of the provisions of Rule 23(b) (see Complaint ¶¶ 56-62), but clearly attempts to couch its claims as being principally equitable in nature, and therefore readily certifiable under Rule 23(b)(2). Specifically, the complaint focuses on plaintiff's requests for an equitable accounting of defendants' pricing practices under the federal drug program and for an injunction against continued overcharging. See *id.*, ¶¶ 63-69; Demand for Relief ¶¶ A-B. Although plaintiff also asserts

claims for breach of contract and for unjust enrichment (itself an equitable claim) (see Complaint ¶¶ 70-77), plaintiff artfully avoids expressly requesting damages, asking instead only for "such other and further relief as the Court may deem just" (Demand for Relief ¶ D). Even so, the inclusion of the unjust enrichment claim leaves no doubt that plaintiff seeks to recover the amount by which the putative class allegedly was overcharged during the twelve-year class period, which the complaint indicates could total billions of dollars. Indeed, the complaint elsewhere asserts that "[t]his case is uniquely situated to class action treatment as both liability ***and damages*** flow from the amount charged in excess of a ceiling price, which can be calculated on a formulaic basis." Complaint ¶ 60 (emphasis added).

It is hard to conceive of how it credibly could be argued that a suit seeking to recover several billion dollars for ***past*** overcharges is not one seeking predominantly money damages. The presentation of the claims in this complaint strongly suggests, however, that the plaintiff will try to do just that. What is more, that argument could well succeed under the approach endorsed by the Fifth Circuit in this case, given the allegation that the monetary damages sought can be "calculated on a formulaic basis." See Pet. App. 16a-19a.

2. *Carroll* v. *National Collegiate Athletic Ass'n*, No. CO4-1254C (W.D. Wash.) (filed May 19, 2004). Plaintiff alleges that the National Collegiate Athletic Association ("NCAA") violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, by entering an agreement with its Division I-A member schools to artificially restrain the number of football scholarships that each member can award. The complaint alleges that this unlawful agreement has enabled the NCAA and its co-conspirators to save "hundreds of millions in scholarship monies they would have paid in a market where free competition had been allowed to occur." Complaint ¶ 76.

Plaintiff demands damages on behalf of the class members — which, as noted, the complaint itself estimates could amount to hundreds of millions of dollars — and prays that those damages be trebled as permitted by federal law. See Complaint ¶ 11; Prayer For Relief ¶ D. Plaintiff also seeks a declaration that the NCAA's actions were unlawful and an injunction prospectively prohibiting further scholarship restrictions. See Complaint ¶¶ 11, 89, 96, 104; Prayer For Relief ¶¶ A, C. The complaint asserts that the proposed class thus properly can be certified under Rule 23(b)(2), as an alternative to the other provisions of Rule 23(b). See Complaint ¶ 19.

The class definition itself makes clear, however, that only a portion of the putative class could benefit from the injunctive relief sought. Specifically, plaintiff seeks to represent a class encompassing "all students who," during the four years preceding the filing of the complaint, "were on the football rosters of NCAA Division I-A schools, but who did not receive a full grant-in-aid from their school." Complaint ¶ 19. Obviously, a substantial number of students who played on Division I-A football teams within the last four years already will have graduated, meaning that they cannot benefit from the prospective change in the NCAA's scholarship rules that plaintiffs seek to obtain. But under the Fifth Circuit's approach, that would appear to be no impediment to certifying a class under Rule 23(b)(2).

3. *Buckley* v. *America Online, Inc.*, No. 3:02-cv-00918 (N.D. Cal.) (filed Feb. 22, 2002). Plaintiffs seek to represent, *inter alia*, a nationwide class of customers of defendant America Online, Inc. ("AOL"), to whom it is alleged AOL shipped unordered merchandise and then charged the customers' credit cards or electronic fund accounts for the products. See, *e.g.*, Complaint ¶¶ 1-2, 18, 34. Plaintiffs allege that AOL has failed to refund to the putative class members some or all of the money they were unknowingly charged or that they expended in returning the merchandise to AOL. *Id.*,

¶¶ 24-26. The complaint asserts that AOL's actions "render[] it liable for conversion, negligence, and money had and received, and constitutes unjust enrichment" (*id.*, ¶ 2), and requests an award of compensatory and punitive damages, pre-judgment and post-judgment interest, restitution of the wrongfully taken funds, and the imposition on AOL of a constructive trust for all monies taken from the putative class. See Prayer For Relief ¶¶ 2-3, 6-8. No injunctive relief is sought that would benefit the nationwide class as a whole, although plaintiffs do seek declaratory and injunctive relief on behalf of two proposed subclasses. See *id.*, ¶¶ 4-5. Despite the fact that the complaint on its face seeks only monetary relief for the proposed nationwide class, plaintiffs assert that the putative class may be certified, *inter alia*, under Rule 23(b)(2). See Complaint ¶ 34. As already noted, that outcome would be irreconcilable with the plain language of the Rule. Under the Fifth Circuit's approach, however, the fact that a subset of the class members might benefit from an injunctive remedy could suffice to certify the claims for class adjudication.

These examples illustrate the ease with which a request for injunctive relief from which some class members might benefit can be added to claims that, on their face, seek primarily monetary relief for the class as a whole. Under the panel majority's decision, that likely would suffice to certify such suits as (b)(2) class actions, thereby avoiding Rule 23(b)(3)'s safeguards of the cohesiveness and commonality of interest among class members seeking individual monetary relief. The absence of such safeguards from (b)(2) class actions already has prompted this Court to declare that there is a substantial possibility that suits seeking monetary relief may never be certified under Rule 23(b)(2). See *Ticor*, 511 U.S. at 121; *Ortiz*, 527 U.S. at 844-845 (citing *Ticor*). The manipulation of Rule 23(b)(2) by the panel majority in this case demonstrates not only that this Court's apprehensions are justified, but that the time has come to definitively re-

solve the question. Accordingly, the petition for a writ of certiorari should be granted.

II. THE FIFTH CIRCUIT'S DECISION INVITES DUE PROCESS VIOLATIONS

Review by this Court of the decision below is warranted for the additional reason that the analysis employed by the panel majority is rife with potential due process violations. This Court has emphasized that, in the quest to achieve the "efficiency" offered by the class-action device, federal courts "'shall not abridge, enlarge or modify any substantive right.'" *Amchem*, 521 U.S. at 613, 615 (quoting the Rules Enabling Act, 28 U.S.C. § 2072(b)); see also *Ortiz*, 527 U.S. at 845 (explaining that "no reading" of Rule 23 "can ignore the [Rules Enabling] Act's mandate that rules of procedure 'shall not abridge, enlarge or modify any substantive right'") (quoting 28 U.S.C. § 2072(b)) (some internal quotation marks omitted). What this means, as a practical matter, is that courts may not relieve plaintiffs in a class action of the burden of proving the individualized elements of their claims and may not deprive defendants of the right to put on individualized evidence, to raise individualized defenses, and to receive a verdict on the individualized facts of each class member's claims. See generally *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) ("'Due process requires that there be an opportunity to present every available defense.'") (quoting *American Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)); *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) (a defendant's "right to litigate the issues raised" is "a right guaranteed to him by the Due Process Clause"). The decision of the panel majority contravenes these due process principles in several ways.

To begin with, in opposing class certification, the defendants pointed out that individual trials would be required in order to determine whether any particular class member's "rates and policies were justified by valid insurance under-

writing and sound actuarial calculations," including "underwriting based on the insured's medical condition, income, job classification, job history, and other facts which have an impact on mortality risks and persistency (the likelihood of steady premium payments)." Pet. 7. For example, the premium charged to a morbidly obese individual who had a family history of heart disease, was a heavy smoker, and worked in a hazardous occupation could have been the same as or higher than the race-based premium charged to that individual. Of course, if a class member would have paid the same (or a higher) premium even if race-based factors were not employed by the insurer, the class member could not prove injury and hence could not state a valid claim.

The district court accepted this argument, ruling that "many and a variety of hearings would be required to determine personalized harm to each individual plaintiff because of the mass of policies involved, differing underwriting practices among some 280 companies, differing built in benefits, account dividends, and age at policy issuance." Pet. App. 55a. The panel majority did not reject the district court's finding, but instead treated "the idiosyncrasies" of each class member's personal situation as impacting only the calculation of the amount of each class member's damages, not whether the class member was entitled to any damages at all. Pet. App. 16a.

By thus glossing over the impact that individualized factors would have on the prosecution of the claims of the members of the putative class, the panel majority endorsed an approach by which the defendants in this action likely will be "forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation." *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998). Because the Fifth Circuit's approach necessarily lightens the plaintiffs' burden of proving the "injury" element of each class member's claim, it cannot be reconciled with

this Court's admonition that the class-action device may not be used to alter substantive rights. As the Fourth Circuit has explained: "[C]ourts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk, realized here, of a composite case being much stronger than any plaintiff's individual action would be." *Ibid.*

Indeed, the Fifth Circuit's subordination of the defendant's right to insist on individualized adjudication of individualized issues to what it deemed to be the broader social benefit of class-wide adjudication puts it in square conflict with the Texas Supreme Court. Consistent with this Court's due process precedents, that court reversed the certification of a personal injury class action arising out of a refinery tank fire, explaining that the defendant was "entitled to a fair opportunity to individual determinations of causation and damages for each of the 904 plaintiffs" and that this encompassed a right "to challenge the credibility of and its responsibility for each personal injury claim individually." *Southwestern Ref. Co.* v. *Bernal*, 22 S.W.3d 425, 437 (Tex. 2000). Because the contours of the federal due process clause should not vary based on whether a case is filed in state court rather than federal court, review is necessary to resolve the conflict between the Fifth Circuit and the Texas Supreme Court on this important issue.

Equally troubling from a constitutional standpoint is the panel majority's conclusion that individual limitations issues did not have to be factored into the class certification analysis. Specifically, the panel majority held that, for class certification purposes, the district court should presume that the class lacked knowledge of the defendants' alleged unlawful conduct. Pet. App. 20a n.22 ("Here, accrual of the statute of limitations is premised on defendants' common practice of concealment, so a presumption of unawareness by the plaintiff class is warranted."); see also *id.* at 19a ("Doubtless most class members, the majority of whom are poor and unedu-

cated, remain unaware of defendants' discriminatory practices.").

The majority justified this unprecedented approach on the ground that treating the limitations question as an individualized issue "would foreclose use of the class action device for a broad subset of claims, a result inconsistent with the efficiency aims of rule 23." Pet. App. 20a. In so reasoning, the majority was looking through the wrong end of the telescope. It is not the function of the courts to create rules that maximize the availability of the class-action device. As this Court admonished in *Amchem*, "the rulemakers' prescriptions for class actions may be endangered by 'those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the Rule] with distaste.'" 521 U.S. at 629 (quoting C. Wright, Law of Federal Courts 508 (5th ed. 1994)).

The upshot of removing limitations issues from the class certification process is to treat "knowledge" and "constructive notice" as class-wide issues. Pet. App. 19a, 20a. That one-size-fits-all approach cannot be reconciled with the fundamental constitutional principle that "'[d]ue process requires that there be an opportunity to present every available defense.'" *Lindsey*, 405 U.S. at 66 (quoting *American Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)). See also, *e.g.*, *Western Elec. Co.* v. *Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) ("[T]o deny [the defendant] the right to present a full defense on the issues would violate due process."). In the context of a class action, the right to present "every available defense" means the right to take individualized discovery and to put on individualized evidence to establish individualized defenses, including the statute-of-limitations defense.[3]

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[3] See, *e.g.*, *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997) (refusing to certify nationwide class of consumers claiming to have received defective siding products because, among other things, "it is apparent that

The all-or-nothing approach necessitated by the majority's ruling also threatens to violate the due process rights of absent class members. Under the majority's approach, there will be a single statute-of-limitations determination (or perhaps one per state) that will be binding on both defendants and the class members. Yet given the panel's suggestion that the notice provided to this (b)(2) class need not be as stringent as the notice provided in a (b)(3) case (Pet. App. 13a n.13), there is virtually no chance that absent class members will receive fair and adequate notice that their claims might be forever forfeited as a result of a statute-of-limitations determination made on the basis of someone else's knowledge. Moreover, the panel was equivocal at best as to whether the right to opt out may be afforded in a (b)(2) class action. *Id.* at 13a & n.15. Hence, even class members who are aware of the risks of the all-or-nothing approach established by the panel majority may not be able to do anything about it.

Indeed, the panel majority's treatment of the statute-of-limitations issue well illustrates the error in its assumption that a suit seeking substantial money damages on behalf of millions of people can be certified as a (b)(2) class action and bind absent class members based solely upon the kind of limited notice that traditionally has sufficed for true (b)(2) class

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[defendant] cannot receive a fair trial without a process which permits a thorough and discrete presentation of [its individualized] defenses"); *Lusardi* v. *Xerox Corp.*, 118 F.R.D. 351, 370 (D.N.J. 1987) (decertifying age discrimination class action and noting that "[t]o proceed without permitting Xerox to raise at the liability stage of trial each and every defense available to it where each potential class member is readily identifiable and must step forward in order to assert and prove an individual claim for liability or at least be the subject of a defense particular to each such plaintiff would deprive defendant of the Fifth Amendment right to due process"), mandamus granted on other issues, 855 F.2d 1062 (3d Cir. 1988).

actions. The drafters of Rule 23 afforded mandatory notice and opt-out rights solely to the members of a (b)(3) class in recognition of the fact that class actions certified under that provision could conflict with "the interests of the individuals in pursuing their own litigations." Rule 23(c)(2), Advisory Committee Note; see also *Amchem*, 521 U.S. at 615 (observing that the drafters of Rule 23(b)(3) were "[s]ensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other"). By contrast, as discussed above, a (b)(2) class is assumed to be a homogeneous and cohesive group with few, if any, conflicting interests among its members. There is no cohesiveness to the (b)(2) class, however, when, as here, an absent class member's right to recover money damages could forever be barred on the basis of a defense that would not be successful against that plaintiff if he or she had pursued an individual claim. Because this Court has held that an absent class member's right of action for money damages cannot be extinguished unless the class member first receives notice plus the opportunity to opt-out (see *Ortiz*, 527 U.S. at 847-848 (discussing the Court's holding in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-812 (1985)), it follows that the procedure typically utilized in true (b)(2) cases — limited notice and no right to opt out — would violate due process in this case.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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